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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

BOARD OF EDUCATION OF OAK PARK AND RIVER FOREST HIGH SCHOOL DISTRICT NO. 200,

Petitioner,

vs.

ILLINOIS STATE BOARD OF EDUCATION,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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118 pp

QUESTIONS PRESENTED

Whether federal courts have the authority to hold a State educational agency financially responsible to a local educational agency for a violation of the Individuals With Disabilities Education Act, 20 U.S.C. § 1401 et seq.

Whether this Court's holding in Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993) requires state educational agencies to permit local educational agencies to consent to the placement of disabled students in any private non-state approved school that will provide appropriate special education services within the meaning of the Individuals With Disabilities Education Act.

PARTIES

The parties to the proceeding in the United States Court of Appeals for the Seventh Circuit were the Illinois State Board of Education and the Board of Education of Oak Park and River Forest High School District No. 200.[1]

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[1] Petitioner, Board of Education of Oak Park and River Forest High School District No. 200, is a political subdivision of the State of Illinois.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit entered in this case on March 24, 2000.

OPINIONS BELOW

This Petition seeks review of a decision of the United States Court of Appeals for the Seventh Circuit reported at 207 F.3d 931 (7th Cir. 2000). It appears in Appendix A, *infra*. The decision of the United States District Court for the Northern District of Illinois is reported at 21 F.Supp.2d 862 (N.D. Ill. 1998), and is set forth in Appendix B, *infra*.

BASIS FOR JURISDICTION

The judgment of the Court below presented for review was entered on March 24, 2000. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sections 1411, 1412 and 1415 of the Individuals With Disabilities Education Act (hereinafter referred to as the "IDEA"), 20 U.S.C. §§ 1411, 1412, 1415. Section 1411 is lengthy and of secondary importance to the questions presented. Accordingly, it is set forth in Appendix C, *infra*. Sections 1412 and 1415 provide, in pertinent part, as follows:

§ 1412. State Eligibility

(a) In general

A state is eligible for assistance under this subchapter if the State demonstrates to the satisfaction of the Secretary that the State has in effect policies and procedures to ensure that it meets each of the following requirements:

(1) Free appropriate public education:

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

* * * *

(10) Children in private schools

(B) Children placed in, or referred to, private schools by the public agencies

(i) In general

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost

> to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

(11) State educational agency responsible for general supervision

(A) In general

The State educational agency is responsible for ensuring that –

(i) the requirements of this subchapter are met. . .

§ 1415(i)(2)(B): In any action brought under this paragraph, the court –

> (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

Section 14-7.02 of the Illinois School Code, 105 ILCS 5/14-7.02. Section 14-7.02 provides, in pertinent part, as follows:

> **If a child has been placed in an approved individual program and the tuition costs including room and board costs have been approved by the Review Board, then such room and board costs shall be paid by the appropriate State agency subject to the provisions of Section 14-8.01 of the Act.**

Sections 401.10 and 226.430 of the Illinois Administrative Code, 23 Ill.Admin.Code §§ 401.10, 226.430.

Section 401.10 provides, in pertinent part, as follows:

> **A program not approved in accordance with the requirements of this Part shall not be used by school districts to serve students with disabilities under Section 14-7.02 of the School Code.**

Section 226.430(b) provides, in pertinent part, as follows:

> **§ 226.430(b). In addition, no school district shall place any student in a nonpublic special education program, nor shall any program accept placement of any student under Section 14-7.02 of the School Code, unless all the following conditions have been met.**
>
> **1) The program has been approved by the State Board of Education for the school year for which placement is sought.**

2) The allowable costs for the program have been established pursuant to Section 14-7.02 of the School Code.

* * * *

4) The program has been approved by the State Board of Education for the student's primary and secondary disabilities.

5) The program has been approved by the State Board of Education for the age range that includes the age of the student.

STATEMENT OF THE CASE

A.

PROCEDURE BELOW

This case originated as a dispute over the appropriate special education placement for a disabled student enrolled at Oak Park and River Forest High School District No. 200 ("School District") that was eligible for special education services under the IDEA. Rather than educate the student at her local public school, the student's parents enrolled her in a private residential school that had not been approved for placement by the Illinois State Board of Education ("ISBE"). Thereafter, in a state administrative due process hearing initiated by the parents, an ISBE appointed hearing officer ruled that the School District failed to offer the student a free

appropriate public education as required by the IDEA. The hearing officer also ruled that the student's private residential school was an appropriate special education placement under the IDEA. On these grounds, the hearing officer ordered the School District to pay the cost of the student's private school.

The School District appealed the hearing officer's decision to the United States District Court for the Northern District of Illinois. In the portion of the School District's lawsuit giving rise to this Petition, the School District requested a judgment against the ISBE for the full amount of any order entered against it for the cost of the student's private special education placement, as well as any attorney's fees awarded to the student's parents as prevailing parties. The School District filed a summary judgment motion in support of its claims against ISBE. The district court granted the School District's summary judgment motion in part, and ordered ISBE to pay a portion of the cost of the student's private special education placement due to its responsibility for the violation of her rights under the IDEA and ordered that ISBE reimburse the School District for fifty percent (50%) of the attorney's fees awarded to the parents as prevailing parties.

B.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

Under the Illinois statutory scheme enacted pursuant to the IDEA, if a disabled child is placed in a private school rather than her local public school, the local

school district is entitled to reimbursement for tuition paid in excess of the per capita tuition charge for students not receiving special education services. 105 ILCS 5/14-7.02. Section 14-7.02 further provides:

> **If a child has been placed in an approved individual program and the tuition costs including room and board costs have been approved by the Review Board, then such room and board costs shall be paid by the appropriate State agency subject to the provisions of Section 14-8.01 of the Act. (emphasis added)**

105 ILCS 5/14-7.02.

The ISBE has promulgated regulations pursuant to section 14-7.02. These regulations provide that:

> **A program not approved in accordance with the requirements of this Part shall not be used by school districts to serve students with disabilities under Section 14-7.02 of the School Code.**

23 Ill.Admin.Code § 401.10.

ISBE's administrative regulations further provide, in pertinent part:

> **In addition, no school district shall place any student in a nonpublic special education program, nor shall any program accept placement of any student under Section 14-**

7.02 of the School Code, unless all the following conditions have been met.

1) The program has been approved by the State Board of Education for the school year for which placement is sought.

2) The allowable costs for the program have been established pursuant to Section 14-7.02 of the School Code.

*** * * ***

4) The program has been approved by the State Board of Education for the student's primary and secondary disabilities.

5) The program has been approved by the State Board of Education for the age range that includes the age of the student.

23 Ill.Admin.Code § 226.430(b). Taken together, these provisions promulgated by the ISBE prohibit a school district from placing a student in a non-ISBE approved school and obtaining reimbursement from ISBE for that placement.

However, in Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 114 S.Ct. 361 (1993), this Court held that a disabled student's parents may be entitled to reimburse-

ment even if they place the student in a non-state approved private school:

> Nor do we believe that reimbursement is necessarily barred by a private school's failure to meet state educational standards . . . Parents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement.

Carter, 510 U.S. at 14, 114 S.Ct. at 365-66.

The private school in which the student was placed in the case underlying this litigation was not ISBE-approved. Thus, the School District was in the position where, even if it so desired, it could not have consented to the parents' request to place the student at that private school because it was prohibited from doing so by ISBE's regulations.

C.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The United States District Court for the Northern District of Illinois had jurisdiction pursuant to 28 U.S.C. § 1331 because this case concerned a federal question under the Individuals With Disabilities Education Act, 20 U.S.C. § 1401 et seq.

REASONS FOR ALLOWANCE OF THE WRIT

The Seventh Circuit's decision suggests that the School District has made an unprecedented claim against ISBE that is easily disposed of on the grounds that the IDEA does not explicitly authorize federal courts to reallocate financial responsibility for violations between State and local educational agencies. This is incorrect. The United States Court of Appeals for the Fifth Circuit has held directly to the contrary. Furthermore, United States Court of Appeals for the Fourth Circuit has interpreted the IDEA as providing federal courts with broad discretion to fashion awards against violators, including the States. The Seventh Circuit's decision not only conflicts with the decisions of these courts, it is based on completely irreconcilable considerations.

The Seventh Circuit's decision also fails to address a glaring contradiction between ISBE's regulatory system governing the provision of special education services in private schools and a decision of this Court interpreting the IDEA. This contradiction is not limited to Illinois. Many States have enacted similar regulatory systems that effectively void this Court's holding that the IDEA entitles parents to educate their disabled children in any appropriate setting. For these reasons, Petitioner requests that this Court grant the writ.

I.

THE SEVENTH CIRCUIT'S HOLDING THAT THE IDEA DOES NOT EMPOWER FEDERAL COURTS TO AWARD THE RELIEF REQUESTED BY PETITIONER IS IN CONFLICT WITH THE DECISIONS OF OTHER UNITED STATES COURTS OF APPEAL

In reversing the district court's judgment against the State, the Seventh Circuit did not quarrel with its central finding that ISBE shared "substantial responsibility" for the failure to offer the student a free appropriate public education as required by the IDEA. Board of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ., 21 F.Supp. 2d 862, 883 (N.D.Ill. 1998). Rather, it based its decision on the proposition that federal courts do not have authority to reallocate financial responsibility among state and local educational agencies for violations of the IDEA. Board of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Kelly E. and Illinois State Bd. of Educ., 207 F.3d at 931, 935-937 (7th Cir. 2000). The Seventh Circuit's holding directly conflicts with the Fifth Circuit's decision in St. Tammany Parish School Bd. v. State of Louisiana, 142 F.3d 776 (5th Cir. 1998).

In St. Tammany, the school district filed suit against a student's parents and several state agencies, including the Louisiana State Board of Education, seeking review of an administrative hearing officer's decision that required it to reimburse the cost of the student's interim special education placement in a private residential facility. The district court reallocated the school district's financial responsibility to the State, and the Fifth Circuit affirmed. St. Tammany, 142 F.3d at 777. The Fifth Circuit

observed that while section 1415 of the IDEA (20 U.S.C. § 1415) gives a federal court the authority to "grant such relief as [it] determines is appropriate," it contains no express provision for allocating financial responsibility for special education placements between state and local educational agencies. St. Tammany, 142 F.3d at 783.[2] Consequently, it reviewed the IDEA's "language and structure" to determine the propriety of the district court's judgment in favor of the school district. Id.

Following the Fourth Circuit's decision in Gadsby v. Grasmick, 109 F.3d 940 (4th Cir. 1997), the Fifth Circuit stated that:

> [t]here is nothing in either the language or the structure of IDEA that limits the district court's authority to award reimbursement costs against the [state educational agency], the [local educational agency], or both in any particular case. . . [B]oth the language and the structure of IDEA suggest that either or both entities may be held liable for the failure to provide a free appropriate public education, as the district court deems appropriate after considering all relevant factors.

St. Tammany, 142 F.3d at 783-784. The Fifth Circuit buttressed this conclusion by reference to section 1412 (20 U.S.C. § 1412), which places primary compliance responsibility on the States by requiring them to ensure

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[2] Since the Fifth Circuit's decision in St. Tammany, the IDEA has been reauthorized by Congress. This has resulted in a re-numbering of section 1415. The language cited by the Fifth Circuit as section 1415(e)(2) is now located at section 1415(i)(2)(B).

that IDEA's requirements are met for each student. St. Tammany, 142 F.3d at 784 (citing 20 U.S.C. § 1412(6)).[3] Thus, the Fifth Circuit affirmed the district court's reallocation of financial responsibility from the school district to the State based on the federal courts' broad remedial authority under the IDEA and the State's statutory responsibility for ensuring that each eligible student is provided a free appropriate public education.

Here, the Seventh Circuit did not acknowledge the Fifth Circuit's decision in St. Tammany, much less attempt to reconcile it with its holding on the same issue. Moreover, in its search for statutory language that provides a verbatim authorization for the district court's judgment against the State, the Seventh Circuit failed to consider the implications of a federal court's power under section 1415 to grant whatever relief it "determines is appropriate" in actions under the IDEA. It likewise failed to address the consequences of the State's ultimate compliance responsibility under section 1412. Thus, the Fifth and Seventh Circuits have not only diverged on the same issue, they have done so based on separate and irreconcilable considerations.

The Seventh Circuit's decision similarly conflicts with the Fourth Circuit's decision in Gadsby. There, the Fourth Circuit laid the foundation for the Fifth Circuit's decision in St. Tammany by holding that the State of Maryland may be responsible under the IDEA for the

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[3] The Congressional reauthorization of the IDEA after St. Tammany also resulted in a renumbering of section 1412. The provision cited by the Fifth Circuit as section 1412(6) is now located at section 1412(a)(11).

failure to provide a student with a free appropriate public education. Gadsby, 109 F.3d at 952-954. As did the Seventh Circuit in this case, the Fourth Circuit recognized that the IDEA does not specifically authorize a judgment against a State. Gadsby, 109 F.3d at 954. However, it did not seize upon that fact to bar the claim. Instead, it concluded that the federal courts' broad remedial authority coupled with the States' ultimate responsibility for violations of the IDEA permit federal courts to allocate the cost of a student's private school to either the State or the school district in accordance with their relative degree of fault for a violation. Gadsby, 109 F.3d at 954-955.

The Seventh Circuit not only failed to reconcile its decision with the conflicting precedent, it strayed entirely outside the ambit of the IDEA and reversed the district court by analogy to contribution claims brought by violators of Title VII of the Civil Rights Act of 1964 and the federal antitrust laws. Specifically, it found that "simple grants of jurisdiction along the lines of § 1415(i)(3) do not permit courts to reallocate loss among joint wrongdoers."[4] Board of Educ. of Oak Park and River Forest High Sch. Dist. No. 200, 207 F.3d at 936 (citing Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 101 S.Ct. 2061 (1981) and Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 101 S.Ct. 1571 (1981)). Yet the IDEA's jurisdictional grant was never invoked by the Fourth or Fifth Circuits in Gadsby and St. Tammany and never asserted by the School District as a basis for affirming the

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[4] Section 1415(i)(3)(A) states that "[t]he district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy." 20 U.S.C. § 1415(i)(3)(A).

district court's judgment against ISBE. Moreover, the comprehensive remedial schemes of Title VII and the federal antitrust laws differ substantially from the IDEA's brief, open-ended mandate that federal courts shall grant such relief as they determine appropriate. Compare 42 U.S.C. § 2000e-5(f),(g); 15 U.S.C. § 15; 20 U.S.C. § 1415(i)(2)(B)(iii).

In order to reconcile these conflicting decisions, this Court should grant the writ.

II.

THE PETITIONER CHALLENGES STATE LAWS THAT COULD IMPAIR THE DELIVERY OF FEDERALLY MANDATED SPECIAL EDUCATION SERVICES THROUGHOUT THE NATION

Under the IDEA, States receiving federal special education funds are required to ensure that all eligible students are provided with a free appropriate public education. 20 U.S.C. § 1412. Typically, this is accomplished at a student's local public school. In the cases of some students, however, their disabilities are so unique or severe that the public schools cannot fulfill this requirement. Consequently, these students are provided special education services in private schools. This is a common occurrence. During the 1996-97 school year, 61,260 disabled students eligible for special education services under the IDEA were educated in private day schools. *Department of Education's 21st Annual Report to Congress on the Implementation of the Individuals with Disabilities Education Act, Table III-2.* An additional

14,828 disabled students were educated in private residential schools during that year. Id.

Many States impose restrictions on the utilization of private schools to provide special education services. For example, Illinois expressly forbids school districts from consenting to the placement of disabled students in private schools that have not been approved by the ISBE. 105 ILCS 5/14-7.02; 23 Ill. Admin. Code §§ 226.430, 401.10. Illinois is not unique in this respect. At least twenty other states have enacted laws and/or regulations that limit a school district's discretion to place disabled students in private schools that have not been approved by the State educational agency (See Appendix D, *infra*).

In all of these States, public schools and disabled students may face the same dilemma that gave rise to the School District's claim against ISBE in this case. That is, in instances where a student's disabilities are such that she can only receive appropriate special education services in a private school that is not on a State's approved list, that student's local public school will either be required to oppose that placement or be severely restricted in its ability to consent to it. In all such cases, the States will have caused or contributed to a violation of the student's right under the IDEA to a free appropriate public education.

As discussed in greater detail below, this Court held in 1993 that the IDEA does not preclude a parent's claim for reimbursement simply because she enrolled her child in a non-state approved private school. Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14, 114 S.Ct. 361, 365-366 (1993). Despite this holding, many States

persist in prohibiting school districts from cooperating with parents when a non-state approved private school is the only appropriate special education placement option. In Carter, this Court recognized a parent's right under the IDEA to educate her disabled child in any appropriate setting without penalty. As long as school districts are hamstrung by the States in their efforts to cooperate with a parent's exercise of that right, Carter's promise for affected students throughout this nation could remain unfulfilled or be realized through unnecessary costly litigation. In either case, the end result of the nullification of Carter by Illinois and other States is likely to be a widespread breakdown in the delivery of special education services to those students who are most urgently in need of them.

III.

THE SEVENTH CIRCUIT'S DECISION FAILS TO ADDRESS AN IRRECONCILABLE CONFLICT BETWEEN A DECISION OF THIS COURT AND STATE LAWS RESTRICTING THE USE OF PRIVATE SCHOOLS TO PROVIDE SPECIAL EDUCATION SERVICES

Parents are entitled to reimbursement for the cost of an appropriate private special education placement even if the school they select is not on a State's list of approved private schools. Carter, 510 U.S. at 14, 114 S.Ct. at 365-366. ISBE regulations expressly prohibit school districts from utilizing non-approved private schools to serve disabled students regardless of whether those schools are an appropriate special education placement. As such, they are squarely at odds with this Court's interpretation of the IDEA. Nevertheless, the Seventh

Circuit concluded that Carter does not support the School District's claim because it does not impact the allocation of federal special education funds between State and local educational agencies under section 1411 of the IDEA (20 U.S.C. § 1411). Board of Educ. of Oak Park and River Forest High Sch. Dist. No. 200, 207 F.3d at 936-938.

In so concluding, the Seventh Circuit mischaracterizes the School District's argument and the implications of the Carter decision. The School District does not claim that ISBE's rules governing private special education placements leave Illinois in dereliction of its aggregate funding obligations under section 1411, and does not characterize Carter to so hold. This case has nothing to do with the aggregate special education funding obligations of State and local educational agencies.

The nexus between Carter and ISBE's placement scheme lies instead in the individual case, such as this one, where a student's special education needs exceed the capacity of the public schools and can only be met in a private school that is not on a State's approved list. In all such cases, State laws such as those existing in Illinois prohibit school districts from agreeing to enroll the student in the school that will provide her with the appropriate special education services to which she is entitled. Consequently, they force the school district to violate the student's IDEA rights. If this lamentable state of affairs is sanctioned by the IDEA, this Court should clarify its decision in Carter accordingly.

The writ should also be granted because the Seventh Circuit's myopic application of Carter is

contradicted by the Fourth Circuit. In Gadsby, *supra*, Maryland law required the approval of the State Department of Education prior to a disabled student's enrollment in a private school. Gadsby, 109 F.3d at 944-945. Following the student's placement in a non-approved private school, the parents sued the State for reimbursement of all costs that were not paid by the school district. The State denied liability on the grounds that the parents and school district failed to comply with its private school approval requirements. Gadsby, 109 F.3d at 953.

The Fourth Circuit rejected the state's argument, reasoning that:

> **The State of Maryland, then, is not only permitted to regulate IDEA funds in such a way as to ensure that they are expended in compliance with the IDEA, but they are required to do so. The question here, however, is whether [the State] may avoid liability for a portion of Eric Gadsby's tuition costs because [the school district] failed to comply with Maryland's laws and regulations governing reimbursement of private school tuition under IDEA. As noted above, in *Carter*, the Supreme Court held that the parents' failure in that case to select a private program that had been approved by the State was not itself a bar to the parents' bid for reimbursement.**
>
> *** * * ***
>
> **By definition, the unilateral placement of a child in an out-of-state private program by a parent does not comply with Maryland's approval require-**

> ments [citation omitted]. Nevertheless, under *Carter*, if the [parents] meet the requirements for reimbursement of private school tuition under *Burlington* and *Carter*, neither the [parents'] failure nor [the school district's] failure to obtain prior approval from [the State] for the placement would automatically bar an award of reimbursement against [the State].

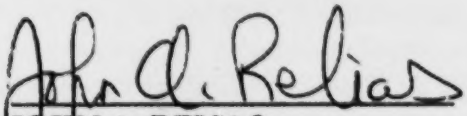
Gadsby, 109 F.3d at 953-954 (emphasis added). The Fourth Circuit remanded the case to the district court with instructions to apportion liability to the State in accordance with its responsibility for the failure to provide the student an appropriate special education placement. Gadsby, 109 F.3d at 954-955.

The Fourth Circuit has sensibly concluded that a State cannot avoid liability for causing the violation of a student's IDEA rights by hiding behind a statutory approval requirement for private special education placements. In order to bring the States into compliance with their obligation to provide appropriate special education services for every eligible student, this Court should grant the writ and determine conclusively whether school districts have the liberty to facilitate a parent's right to educate her disabled child in any appropriate setting, or whether States can nullify Carter's holding and rationale in cases where a disabled child can only receive appropriate special education services at a non-state approved private school.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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June 9, 2000

No.

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APPENDIX

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APPENDIX A

Board of Education of Oak Park and River Forest High School
District No. 200, Plaintiff-Appellee, v. Kelly E., by her parent and next friend Nancy E., Defendant, and Illinois State Board of Education, Defendant-Appellant. T.H., a minor, and L.H. and S.H., individually and as next friends of T.H., Plaintiffs, v. Board of Education of Palatine Community Consolidated School District No. 15, et al., Defendants-Appellants, v. Illinois State Board of Education and Glenn McGee, Superintendent of Education, Third-Party
Defendants-Appellees.

No. 99-1589, No. 00-1361

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

207 F.3d 931; 2000 U.S. App. LEXIS 4682

December 10, 1999 *, Argued

* A prior appeal in T.H. v. Palatine Board of Education, No. 99-2493, was argued on December 10, 1999, and dismissed for want of jurisdiction on December 15 after the court concluded that the judgment appealed from did not dispose of all claims and did not specify the relief to which the prevailing party was entitled. After the district court entered a final judgment on January 26, 2000, the new appeal (No. 00-1361) was submitted for decision on the basis of the March 24, 2000, Decided

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Illinois, Eastern

Division. No. 98 C 2390. Morton Denlow, Magistrate Judge. Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 98 C 4633. James B. Moran, Judge.

DISPOSITION: Palatine case affirmed. Oak Park case is vacated in part and remanded for entry of a new judgment.

COUNSEL: For T. H., a minor, L. H., S. H., Plaintiffs (00-1361): Seth P. Robert, GRAUBARD, MOLLEN & MILLER, New York, NY. Mary E. Moran, FAMILY LAW CENTER OF THE NORTH SHORE, Glencoe, IL.

For BOARD OF EDUCATION OF PALATINE COMMUNITY CONSOLIDATED SCHOOL DISTRICT NO. 15, JOHN CONYERS, DARRELL MITTELHEUSER, Defendants - Appellants (00-1361): John A. Relias, FRANCZEK, SULLIVAN, MANN, CREMENT, HEIN & RELIAS, Chicago, IL USA.

For GLEN MCGEE, Defendant - Appellee (00-1361): Michael P. Doyle, OFFICE OF THE ATTORNEY GENERAL, Chicago, IL USA.

For BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT 200, Plaintiff - Appellee (99-1589): John A. Relias, FRANCZEK, SULLIVAN, MANN, CREMENT, HEIN & RELIAS, Chicago, IL USA.

For ILLINOIS STATE BOARD OF EDUCATION, Defendant - Appellant (99-1589): Michael P. Doyle, OFFICE OF THE ATTORNEY GENERAL, Chicago, IL USA.

JUDGES: Before Easterbrook, Rovner, and Diane P. Wood, Circuit Judges.

OPINION BY: Easterbrook

OPINION: Easterbrook, Circuit Judge. Does the Individuals with Disabilities Education Act, 20 U.S.C. sec.sec. 1400-87, entitle a local school district to reimbursement from the state for some or all of the expense when the district must reimburse parents for a child's private education? A court may direct a school district to pay for private education "if the court ultimately determines that such placement, rather than a proposed IEP [individualized education program], is proper under the Act." *Burlington School Committee v. Massachusetts Department of Education, 471 U.S. 359, 369, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985).* Such an order was entered in both of the cases now on appeal. Magistrate Judge Denlow, presiding by consent under *28 U.S.C. sec.636*(c), concluded that Oak Park's school district had made so many procedural and substantive errors in preparing an IEP for Kelly E. that her parents are entitled to reimbursement for private education. *21 F. Supp. 2d 862 (N.D. Ill. 1998).* District Judge Moran enforced an administrative decision that T.H.'s parents are entitled to reimbursement for an intensive home-based educational program. *55 F. Supp. 2d 830 (N.D. Ill. 1999).* Both school districts have accepted these decisions; the only remaining dispute is whether the state must chip in. Our cases appear to be the first to present that question to a court of appeals.

The magistrate judge directed the state to pay for Kelly E.'s private education and half of her parents' legal expenses. He gave two principal reasons. *21 F. Supp. 2d at 883*, reconsideration denied, *1999 U.S. Dist. LEXIS 1612*. First, he viewed the state as a guarantor of every local school district's compliance with the Act, and therefore responsible for part of the cost. Second, he concluded that state statutes and regulations offering to pay for private placements at approved schools are not generous enough to comply with *Florence County School District v. Carter, 510 U.S. 7, 126 L. Ed. 2d 284, 114 S. Ct. 361 (1993)*, which the magistrate judge understood as calling for state reimbursement of local districts' expenses for private education. Illinois law provides (105 ILCS 5/14-7.02):

> A school district making tuition payments pursuant to this Section is eligible for reimbursement from the State for the amount of such payments actually made in excess of the district per capita tuition charge for students not receiving special education services. . . .
>
> . . .
>
> If a child has been placed in an approved individual program and the tuition costs including room and board costs have been approved by the Review [*934] Board, then such room and board costs shall be paid by the appropriate State agency subject to the provisions of Section 14-8.01 of this Act.

An implementing regulation adds: "A program not approved in accordance with the requirements of this Part shall not be used by school districts to serve students with disabilities under Section 14-7.02 of the School Code." 23 Ill. Adm. Code sec.401.10. This means that a non-approved

program is ineligible for reimbursement under sec.14-7.02, not that such a program "shall not be used" at all. Still, the magistrate judge thought that the statute and regulation steered school districts away from placements that might be educationally best for students, and toward either continued education in the public schools or approved private placements that were educationally less desirable (but cheaper for the local school districts). To counteract this incentive, the magistrate judge directed the state to pay for half of Kelly's education even though state law does not authorize the outlay. By contrast, the district judge in T.H. declined to order the state to contribute toward the cost of the home education. The judge explained: "If the [Palatine school] district was concerned about its ability to recoup expenses in excess of the district per capita tuition charge for students not receiving special education services, see 105 ILCS sec.5/14-7.02, it could have worked harder to develop an appropriate placement that was approved by the state." *55 F. Supp. 2d at 847.* Judge Moran disagreed with the magistrate judge's conclusion that the state must either ensure local districts' compliance or insure their compliance costs.

Illinois, as appellant in the Oak Park case and appellee in the Palatine case, leads off with a flurry of objections to the very possibility of litigation. Local school districts lack standing, the state insists; if they suffer injury in fact, they do not meet prudential standards for adjudication; and if the local districts may sue, still the state is not a proper defendant given the eleventh amendment. None of these arguments was presented in the district court--though if they establish an absence of subject-matter jurisdiction we must consider them anyway. But they are feeble, individually and collectively.

Although, as Illinois stresses, the school districts are not the persons for whose benefit the Act is designed, they have been injured in fact by the need to pay for Kelly E.'s and T.H.'s private education. Although the injury may not be traceable to acts of Illinois, in seeking to recover part of their outlay the school districts are asserting a claim for contribution. Federal courts regularly resolve disputes about contribution. E.g., *McDermott, Inc. v. AmClyde, 511 U.S. 202, 128 L. Ed. 2d 148, 114 S. Ct. 1461 (1994); Akzo Nobel Coatings, Inc. v. Aigner Corp., 197 F.3d 302 (7th Cir. 1999).* Until now, no one has expressed doubt that cross-claims among joint wrongdoers present cases within the scope of Article III. Perhaps the Act does not authorize awards of contribution, but a party's failure to establish a claim for relief differs from a deficiency in subject-matter jurisdiction. *Steel Co. v Citizens for a Better Environment, 523 U.S. 83, 89-90, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998); Bell v. Hood, 327 U.S. 678, 682, 90 L. Ed. 939, 66 S. Ct. 773 (1946).* Recast as a claim that local districts do not fall within the zone of interests protected by the Act and thus lack "prudential" standing, the state's position fares no better, if only because we have held, see *United Transportation Union v. Surface Transportation Board, 183 F.3d 606, 611 (7th Cir. 1999)* (citing cases), that prudential considerations in general, and the zone-of-interests test in particular, are forfeited if not presented in a timely fashion. Illinois asks us to overrule this line of cases, but we decline; requiring litigants to raise zone-of-interests arguments at an early opportunity is compatible with, if not compelled by, decisions of the Supreme Court. See, e.g., *Air Courier Conference v. Postal Workers Union, 498 U.S. 517, 522-23 & n.3, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991).*

[*935] Section 604(a) of the IDEA, *20 U.S.C. sec.1403*(a), provides that "[a] State shall not be immune under the

eleventh amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter." Language this direct satisfies the clear-statement requirement. Illinois contends that abrogation exceeds Congress' powers under sec.5 of the fourteenth amendment, see *Kimel v. Florida Board of Regents, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000); Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999); Boerne v. Flores, 521 U.S. 507, 138 L. Ed. 2d 624, 117 S. Ct. 2157 (1997),* but this is beside the point. Having enacted legislation under its spending power, Congress did not need to rely on sec.5. States that accept federal money, as Illinois has done, must respect the terms and conditions of the grant. *South Dakota v. Dole, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987).* One string attached to money under the IDEA is submitting to suit in federal court. *Bradley v. Arkansas Department of Education, 189 F.3d 745, 752-53* (8th Cir.), rehearing en banc granted on a different issue, *197 F.3d 958 (1999)* (argued January 14, 2000). Although sec.604(a) does not use words such as "consent" or "waiver," it is hard to see why that should matter. Congress did what it could to ensure that states participating in the IDEA are amenable to suit in federal court. That the power comes from the spending clause rather than (as Congress may have supposed) the commerce clause or the fourteenth amendment is not relevant to the issue whether the national government possesses the asserted authority. Otherwise we require the legislature to play games ("guess which clause the judiciary will think most appropriate"). What matters, or at least should matter, is the extent of national power, rather than the extent of legislative prevision. Thus we hold that states must take the bitter with the sweet; having accepted the money, they must litigate in federal court. See also *20 U.S.C. sec.1415*(i)(2). Suit is of course

limited to enforcing the federal terms and conditions; local school districts can't piggyback claims based on state law. We must assume that Illinois has complied with all of its own statutes and regulations; school districts that want a more generous reimbursement policy under 105 ILCS 5/14-7.02 and 23 Ill. Adm. Code sec.401.10 must resort to a state forum. See *Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984)*. But if the IDEA itself entitles a local school district to reimbursement from a state, then the eleventh amendment does not stand in the way.

Thus we arrive at the principal question: does the Act prescribe a particular allocation of expenses between local and state bodies? Magistrate Judge Denlow did not identify a statutory source of authority for his award against the state, and *20 U.S.C. sec.1415*(i)(3)(A) does not by itself supply what is needed. (In 1997 Congress extensively amended the Act. All of our citations are to the current version.) Uncommon as it is for a municipality to sue a state (or the reverse) under federal law, compare *Illinois v. Chicago, 137 F.3d 474 (7th Cir. 1998)*, with *Chicago v. Lindley, 66 F.3d 819, 823 n.6 (7th Cir. 1995)*, sec.1415(i) may allow this under some circumstances. When a parent disagrees with a local decision about a pupil's IEP, an administrative appeal lies to a state agency, see sec.1415(g), and sec.1415(i)(2) allows "any party aggrieved by the [state agency's] findings and decision" to contest the outcome by suit under sec.1415(i)(3). A local board of education therefore may sue the parent asking the court to upset the state's decision and to restore the local board's preferred educational plan. Perhaps, by analogy to federal administrative law, it may sue the state as the decisionmaker (just as employers and unions sue the NLRB). But nothing in this subsection authorizes awards of financial relief in favor of

local educational officials. Cases such as *Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 68 L. Ed. 2d 500, 101 S. Ct. [*936] 2061 (1981),* and *Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 67 L. Ed. 2d 750, 101 S. Ct. 1571 (1981),* show that simple grants of jurisdiction along the lines of sec.1415(i)(3)(A) do not permit courts to reallocate loss among joint wrongdoers.

Title VII of the Civil Rights Act of 1964 authorizes suit in language similar to the IDEA. See *42 U.S.C. sec.2000e-5*(f)(3). A collective bargaining agreement between Northwest Airlines and a union representing some of its employees contained provisions that were held to violate Title VII, leading to an award of damages exceeding $20 million. Blaming the union for this loss, the employer sought an award of contribution--and lost. The Supreme Court assumed that an employer may be a person aggrieved for the purpose of filing a charge under sec.2000e-5(b) and later filing suit. *Northwest Airlines, 451 U.S. at 90.* But it held that the grant of federal jurisdiction, understood in light of the norm that federal courts do not adjust accounts among wrongdoers without statutory authorization, is not enough to authorize contribution. Only if something else in Title VII authorized contribution would such an award be proper. Texas Industries reached the same conclusion for antitrust litigation. Because sec.1415(i)(3) is no more explicit about contribution than is sec.2000e-5(f)(3), the state is entitled to prevail unless something else in the IDEA requires it to reimburse local school districts.

One possibility is sec.1403(b): "In a suit against a State for a violation of this chapter, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as those remedies are available for such a

violation in the suit against any public entity other than a State." This is the language on which Oak Park and Palatine principally rely. But it says only that a state is liable to the same extent as any other public entity. It does not say what that extent may be. If a state may not recover contribution from a local board of education, then under sec.1403(b) a local board can't recover contribution from a state. Whether a state may recover from a board, or a board from a state, can't be answered from the language of sec.1403(b).

But it can be answered, with some confidence, by parsing sec.611 of the Act, *20 U.S.C. sec.1411*, which specifies the allocation of funds between state and local educational entities. Each state that receives money under the Act may keep as much as 25% to pay for direct educational services (a state may run schools of its own), administration, technical assistance, training, hearings, and subgrants for "capacity-building and improvement". *20 U.S.C. sec.1411*(f). Each state must distribute to local educational agencies at least 75% of the federal grant, see sec.1411(g), under a formula that takes as its annual base the amount each local agency received before the 1997 amendments. That amount depended on the number of pupils with disabilities enrolled in each school system; a state was required to apportion the 75% among local districts so that each received approximately the same amount per pupil with a special educational program. See sec.611(d) of the former statute, 108 Stat. 3931. This system tells us two things: first, any school district that receives less than the allocation prescribed by sec.1411(g) is entitled to a remedy under sec.1403(b); second, if the local district has received its full allocation for a given year, it is not entitled to more.

The statutory allocation formula gives local districts a stipend per disabled pupil. This supplement per pupil is supposed to be 30% of the average cost of primary education in the United States. *20 U.S.C. sec.1411*(a)(2). (The statute specifies 40%, but the state is entitled to keep a quarter of this for itself.) Many pupils with disabilities can be educated for less than 130% of the national average, but others cost substantially more. Over time, things should average out so that the grant covers aggregate costs. Instead of directing the states to calculate expenses for each pupil and distribute funds among local districts [*937] accordingly, Congress directed states to apply a formula to the total number of pupils with disabilities. That system would collapse if local districts could in essence make a profit from some pupils with disabilities (those for which the 30% supplement exceeds the costs of special services) while suing the states for more whenever the costs exceeded the average per-pupil grant, as it did for T.H. and Kelly. Then the states, having distributed 75% off the top (as the statute requires), would be required to dip into (maybe exceed) the 25% retainage to cover the additional expenses of the most costly pupils.

Neither Oak Park nor Palatine contends that Illinois has distributed less than the 75% to which the local educational agencies are entitled. Their claims for contribution in this case therefore boil down to arguments that each local educational agency is entitled to an annual base derived from 75% of the state's grant, plus per-pupil supplements whenever the Act requires (or permits a parent to choose) private education. Nothing we can find in *20 U.S.C. sec.1411* or any other section of the IDEA supports such double dipping. A local educational agency that has received its share of the federal appropriation must provide for services out of that

share; it cannot collect more from the state by way of contribution. States may of course agree to pay more out of their own budgets; 105 ILCS 5/14-7.02 appears to represent such a promise. But states may set their own conditions for this largess and, as we have observed already, federal courts are not entitled to enforce state laws against the states themselves.

A few words about Carter bring this opinion to a close. Both school districts rely heavily on this opinion, but it has nothing to do with relative shares of state and local districts. Carter holds that parents may be entitled to reimbursement for private education even though the school they select does not meet all requirements of *20 U.S.C. sec.1401* (a)(8)--and, in particular, does not meet all standards set by the state's educational bureaucracy. The court observed that officials who disagreed with the need for private education were unlikely to give their approval, but that they could not so easily block parents' entitlement to obtain a good education for their child. According to Oak Park and Palatine, the combination of Carter with 105 ILCS 5/14-7.02 leaves them in a bind: they can't get state reimbursement unless the private school has been approved, but they also can't use the lack of approval to avoid reimbursing parents for what may be a costly private placement. That may well be so, but it does not follow that the IDEA requires the state to contribute more than the amount allocated under sec.1411(g). In Carter itself the Justices had this to say about the school district's contention that the Court's holding would break the bank:

> Public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the child

> a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Moreover, parents who, like Shannon's, "unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." *Burlington, 471 U.S. at 373-374.* They are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act.

Finally, we note that once a court holds that the public placement violated IDEA, it is authorized to "grant such relief as the court determines is appropriate." *20 U.S.C. sec.1415*(e)(2). Under this provision, "equitable considerations are relevant in fashioning relief," *Burlington, 471 U.S. at 374,* and the court enjoys "broad discretion" in so doing, *id., at 369.* Courts fashioning discretionary equitable relief [*938] under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable.

510 U.S. at 15-16 (emphasis in original). Neither Oak Park nor Palatine took advantage of the options mentioned in the first paragraph of this passage, and neither district contends that the cost of private education was unreasonable and therefore should not be fully reimbursed under the third paragraph.

Whatever assistance a state may provide, beyond the block grant that the IDEA requires, must be worked out through the state's political and judicial processes. The judgment in the Palatine case is affirmed. The judgment in the Oak Park case is vacated to the extent it requires the state to pay for any of Kelly E.'s private education, and the case is remanded for entry of a new judgment in conformity with this opinion. Illinois already has paid its assigned share of Kelly E.'s private education in years past, but it need not continue to do so and need not reimburse Oak Park for any portion of the attorneys' fees awarded to Kelly's parents.

APPENDIX B

BOARD OF EDUCATION OF OAK PARK & RIVER FOREST HIGH SCHOOL DISTRICT NUMBER 200, Plaintiff, v. ILLINOIS STATE BOARD OF EDUCATION and KELLY E., BY AND THROUGH HER PARENT AND NEXT FRIEND, NANCY E., Defendants.

No. 98 C 2390

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

21 F. Supp. 2d 862; 1998 U.S. Dist. LEXIS 16623

October 19, 1998, Docketed

DISPOSITION: School District's motion for summary judgment against Kelly and her mother granted in part and denied in part and Kelly and her mother's cross motion for summary judgment against School District granted in part and denied in part. School District's motion for summary judgment against ISBE granted in part and denied in part.

COUNSEL: For Plaintiff: John A. Relias, FRANCZEK SULLIVAN P.C., Chicago, Illinois.

For Kelly E., Nancy E., Defendants: Matthew D. Cohen, Cynthia M. Masbaum, MONAHAN & COHEN, Chicago, Illinois.

For Illinois State Board of Education, Defendant: Courtnay C. O'Connell, Assistant Attorney General, General Law Bureau, Chicago, Illinois.

JUDGES: MORTON DENLOW, United States Magistrate Judge.

OPINION BY: MORTON DENLOW

OPINION: MEMORANDUM OPINION AND ORDER

This case presents the issue of who should bear the cost of educating a troubled high school student when her parents decide to unilaterally transfer her from her public high school, where she is failing, to a private residential school, where she finds success. The parents say the school district should pay. The school district says the parents or the State Board of Education should pay. The State Board of Education says [**2] the school district should pay. The Court holds that all parties share legal responsibility for this regrettable situation and they must all pay.

Plaintiff Board of Education of Oak Park & River Forest High School District Number 200 ("the School District") filed a two-count complaint under the Individuals with Disabilities Education Act ("IDEA"), *20 U.S.C. § 1400* et seq.,[1] against

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[1] The IDEA was completely revised by Congress in 1997. See Individuals with Disabilities Education Act Amendments of 1997, Pub. L. No. 105-17, 11 Stat. 37 (codified as amended at *20 U.S.C. § 1400* et seq. (1998)). Although the events giving rise to this action occurred both before and after the enactment of these amendments, the Court has determined that the amendments do not affect the

Defendants Kelly E. ("Kelly"), by and through her parent and next friend, Nancy E., (the "Mother") and the Illinois State Board of Education ("ISBE"). In Count I, the School District appeals a Level II administrative Review Officer's decision requiring the School District to reimburse Kelly's parents for all costs incurred to educate Kelly at Eagle Hill School in Massachusetts. Presently before the Court is the School District's motion for summary judgment against Kelly and her mother challenging the review officer's decision. Kelly and her mother present the Court with a cross motion for summary judgment to affirm the decision. In Count II, the School District requests that, in the event it is found liable to Kelly's parents, the ISBE pay all amounts for which the School District is found liable. The School District has filed a separate motion for summary judgment against the ISBE requesting this relief.

For the following reasons, the Court grants in part and denies in part the School District's motion for summary judgment against Kelly and her mother and grants in part and denies in part Kelly and her mother's cross motion for summary judgment against the School District. The Court grants in part and denies in part the School District's motion for summary judgment against the ISBE.

I. STANDARD OF DECISION

[1] The first issue which the Court must address is the standard to be applied in deciding this case. Although the parties have filed motions for summary judgment, the Court's standard of decision is not the traditional summary judgment

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outcome of this decision because the effective date of the applicable sections of the IDEA is July 1, 1998.

standard. *Morton Community Unit Sch. Dist. No. 709 v. J. M., 152 F.3d 583, 587-88 (7th Cir. 1998).* The IDEA dictates that "the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *20 U.S.C. § 1415*(e)(2). Here, when neither party has requested the Court to hear additional evidence, the "motion for summary judgment is simply the procedural vehicle for asking the judge to decide the case on the basis of the administrative record." *Heather S. v. Wisconsin, 125 F.3d 1045, 1052 (7th Cir. 1997).* Even though the motion is termed as one for summary judgment, this Court's decision must be based on the preponderance of the evidence. See *Heather S., 125 F.3d at 1052; 20 U.S.C. § 1415*(e)(2). "The party challenging the outcome of the state administrative decision bears the burden of proof." *Heather S., 125 F.3d at 1052.*

[2, 3] In reviewing the administrative record, the court "is required to give 'due weight' to the results of the administrative proceedings." *Id. at 1052-53.* Reviewing courts must not "substitute their own notions of sound educational policy for those of the school authorities which they review." *Board of Educ. v. Rowley, 458 U.S. 176, 206, 102 S. Ct. 3034, 3051, 73 L. Ed. 2d 690 (1982).* "The 'due weight' which the court must give to the hearings below is not to the testimony of witnesses or to the evidence - both of which the court must independently evaluate-but to the decisions of the hearing officers." *Heather S., 125 F.3d at 1053.* "Due weight" implies "some sort of deference" to the agency's decision, and thus to the decisions of the hearing officers. Id. When the decisions of the hearing officers conflict, the Seventh Circuit requires that deference be given to the final administrative decision, in

this case, the Level II Review Officer's decision. Id. Perhaps the best way to conceptualize the Court's task is to view it as a bench trial on the papers. *Tripp v. May*, 189 F.2d 198, 200 (7th Cir. 1951) [**6] (holding that it is proper for trial court to decide factual issues and to enter judgment when facts have been fully developed by papers on cross motions for summary judgment).

> [W]hen the court is ruling on cross-motions, the facts sometimes become fully developed at the hearing on the motions. When this occurs in a non-jury case, the court may proceed to decide the factual issues and render a judgment on the merits without any further delay if it is clear that there is nothing else to be offered by the parties and there is no prejudice in proceeding in this fashion. As a practical matter, of course, this procedure amounts to a trial of the action and technically is not a disposition by summary judgment.

10A Charles Alan Wright et al., Federal Practice and Procedure § 2720 (3d ed. 1998). Because the Court is required to apply a preponderance of the evidence standard while giving "due weight" to the results of the administrative proceedings, the Court will treat this case as a bench trial on the papers.[2]

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[2] The use of the summary judgment procedures under Local General Rules 12M and 12N did not serve to facilitate the resolution of this case because those rules are intended to assist the Court in determining whether material questions of fact exist. In the future, this Court will require parties to submit proposed findings of fact, with citations to the record, and proposed conclusions of law.

II. FINDINGS OF FACT

The following represents the Court's findings of fact based on a preponderance of the evidence standard after giving due weight to the decisions of the Hearing and Review Officers. Additional findings will also be found in later portions of this decision.

A. The Parties

Kelly is an eighteen-year-old female student who has an extensive history of behavioral and academic difficulties, beginning in the third grade. (Defs.' Local Rule 12(M) Statement of Material Facts ("Defs.' 12(M)") PP 1, 24-25.) Kelly resides within the boundaries of the School District. The School District is responsible for the education, in compliance with state and federal law, of all student residents in the district. The ISBE is the state educational agency and is ultimately responsible for seeing that all of its constituent school districts are in compliance with the IDEA.

B. Kelly's Special Education Experiences Prior to Enrollment in Plaintiff School District

On February 1, 1994, in Kelly's eighth-grade year, the student services team at her junior high school requested a case study evaluation to determine whether she was eligible for special education. (Defs.' 12(M) PP 28, 30; A.R. at 638.) Academic achievement testing indicated that Kelly was performing at a 5.0 grade level equivalency level in reading, a 5.8 grade equivalency level in mathematics, a 4.6 grade equivalency level in written language, a 4.7 grade equivalency level in letter-word identification (decoding words), and a 3.3

grade equivalency level in dictation (spelling), (Defs.' 12(M) PP 31-32; A.R. at 645); however, Kelly did perform at a 10.0 grade equivalency level in writing samples. (Pl.'s Local Rule 12(N) Response to Defs.' Rule 12(M) Statement of Material Facts ("Pl.'s 12(N)") P 32; A.R. at 732.) Kelly became eligible for special education and related services pursuant to the IDEA on March 15, 1994, under the category of behavior disorder ("BD").[3] (Defs.' 12(M) P 36; A.R. at 668-69.) At the Multi-Disciplinary Conference ("MDC") held on March 15, 1994, school personnel developed an Individual Education Plan ("IEP") for Kelly.[4] (A.R. at 671-73.) The IEP contained the following goals:

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[3] Earlier in this litigation, Kelly stated that she has been eligible for special education since May 9, 1994. (Kelly's Mot. for Statutory Inj. to Enforce the Level II Review Officer's Decision P 2, citing the Level I Hearing Officer's Decision at 3.) This Court set forth this fact in its Memorandum Opinion and Order, dated July 9, 1998, granting Kelly's Motion for Statutory Injunction. May 9, 1994, is the first date that the School District's representatives became involved with Kelly. March 15, 1994, is the first date that Kelly became eligible for special education services from her junior high school.

[4] Another IEP was developed for Kelly during an IEP conference held on April 19, 1994, that changed her placement from Behavior Disorder Consultation to Behavior Disorder Resource and provided for one period of direct service B/D resource. (A.R. at 664-67.) The annual goals set forth in the April IEP were identical to those found in the March IEP. (A.R. at 664-67; A.R. at 671-73.) The April IEP was not signed by Kelly's parent, but school personnel made the representation that Kelly's parent was in agreement with the change of placement. (A.R. at 667.)

(1) To complete assignments on time and turn them into teacher;
(2) To monitor attendance and tardiness;
(3) To decrease resistance to academic assistance;
(4) To increase appropriate strategies to change her attitude toward learning;
(5) To increase on task behavior;
(6) To increase self-confidence and self-esteem.

(A.R. at 672.)

On May 9, 1994, an MDC/IEP meeting took place attended by personnel from the junior high school and Kelly's then future high school, Oak Park River Forest High School ("Oak Park"). (Defs.' 12(M) P 38.) The IEP developed by Oak Park personnel identified Kelly as BD and placed her in a BD resource room and BD social seminar. (Pl.'s Local Rule 12(M) Statement of Material Undisputed Facts ("Pl.'s 12(M)") P 8.) The goals identified were similar to those contained in the prior IEP:

(1) Improve her study and organizational skills;
(2) Arrive on time and remain in classes;
(3) Remain "on task" in class (focus);
(4) Utilize appropriate school resources (request help);
(5) Improve her self-esteem; and
(6) Complete assignments on time (homework).

(Defs.' 12(M) P 40; A.R. at 648.) The IEP developed by Oak Park for Kelly did not provide for annual goals for her reading difficulties. (Defs.' 12(M) P 49; Pl.'s 12(N) P 49.)

C. Kelly's Special Education Experiences While Attending Plaintiff School District

1. The 1994/95 School Year

Kelly entered Oak Park at the beginning of the 1994/95 school year. (Pl.'s 12(M) P 7.) During her freshman year, Kelly exhibited significant academic and behavioral difficulties, including reading difficulties, repeated truancy, disciplinary infractions, and defiance of school rules. (Defs.' 12(M) P 42.) Kelly was chronically truant from school. (Defs.' 12(M) P 69.) She was absent four days during the first semester and twenty days during the second semester. (Defs.' 12(M) P 73.) There were no goals on Kelly's IEP to address her truancy. (Defs.' 12(M) P 74.) Kelly was placed in two remedial reading classes, Essentials of English and Elements of Reading. (Pl.'s 12(M) P 8.) These classes were not special education classes. (Defs.' Local Rule 12(N) Response to Plaintiff's Rule 12(M) Statement of Material Undisputed Facts ("Defs.' 12(N)") P 8; A.R. at 150.) Kelly failed Essentials of English both semesters of the 1994/95 school year. (Defs.' 12(N) P 8; A.R. at 811.) Kelly received a D for the first semester of Elements of Reading and failed the second semester. (Defs.' 12(N) P 8; A.R. at 811.)

Kelly's mother was in frequent contact with Kelly's dean at Oak Park, Sharon Moyer ("Moyer"), during the 1994/95 school year concerning Kelly's poor school attendance involvement with a negative peer group, her academic performance, and her reading difficulties. (Pl.'s 12(M) P 9.) On January 19, 1995, Kelly's mother called the School District's Behavior Development Program Chairperson, Theresa Brannock ("Brannock"), to request a program change. (Pl.'s 12(M) P 11.) Brannock and Kelly's mother agreed that Kelly's

placement should be changed to self-contained for the second semester. (Pl.'s 12(M) P 12.) Although Kelly was moved to the self-contained placement, her IEP was not updated with new goals and objectives until April 5, 1995. (Defs.' 12(N) PP 12-13.)

The April 5, 1995, IEP reflected Kelly's change to the more structured self-contained BD class. (Defs.' 12(N) P 13.) English, Algebra, World History, and Social Seminar classes were provided in the self-contained setting. (Pl.'s 12(M) P 14.) Kelly was also placed in a learning disability ("LD") Reading Strategies course and was slated to receive remedial reading services from the School District's reading specialist, Dr. Haywood. (Pl.'s 12(M) P 14.) Kelly refused to take advantage of Dr. Haywood's services. (Defs.' 12(N) P 14.) The IEP also provided for social work services and summer school. (Pl.'s 12(M) P 15.) Kelly's mother approved all changes. (Pl.'s 12(M) P 15.)

As early as January 1995, Kelly's mother requested that Kelly be tested for a possible learning disability. (Defs.' 12(M) P 53.) At the April 5, 1995, MDC/IEP meeting, the MDC team requested that psychological testing be conducted to better assess Kelly's learning difficulties. (Defs.' 12(M) P 54; A.R. at 1221.) The School District's psychologist never conducted the requested psychological testing because she believed that an eighth grade evaluation, indicating the lack of a learning disability, was sufficient. (Defs.' 12(M) P 54; A.R. at 183-84, 1222, 1223-24.) She made this decision to not test Kelly without reconvening an additional MDC/IEP meeting and without written notice to Kelly's mother. (Defs.' 12(M) P 56; Pl.'s 12(N) P 56.)

In her first semester at Oak Park, Kelly received three Ds and three Fs in academic courses and passed her two pass/fail non-academic classes. (Defs.' 12(M) P 86.) In the second semester of her freshman year, Kelly received one D, five Fs, one N (grade and credit withheld for excessive absences), and passed her one pass/fail non-academic class. (Defs.' 12(M) P 87.) She also received a number of detentions and suspensions. (Defs.' 12(M) P 76.)

2. The 1995/96 School Year

During the 1995/96 school year, Kelly's sophomore year, Kelly continued to exhibit significant behavioral and academic difficulties. (Pl.'s 12(M) P 16.) She was absent 28 days during the first semester and 46 days during the second semester. (Defs.' 12(M) P 73.)[5] She received numerous detentions and in-school suspensions. (Defs.' 12(M) P 84.) The School District employed regular education attendance and disciplinary policies with Kelly, even though a policy for addressing attendance problems of special education students existed. (Defs.' 12(M) PP 70, 83.) In the Fall 1995 semester, Kelly received one B (in Reading Strategies), three Fs, and two Is (incompletes) in academic classes, and she passed one of her two pass/fail non-academic classes. (Defs.' 12(M) PP 88-89.) In the Spring 1996 semester, Kelly either withdrew from or failed all her academic courses and passed three of her six pass/fail non-academic classes. (Defs.' 12(M) P 90; Pl.'s 12(N)

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[5] Paragraph 73 of Defs.' 12(M) refers to Kelly's absences in the 1995/96 and 1996/97 school years; however, the Court assumes these references to be in error because all other evidence indicates that Kelly attended Oak Park during the 1994/95 and 1995/96 school years.

P 90.) Thus, by the end of her second year in high school, Kelly had obtained only ten of the expected twenty credits. (Defs.' 12(M) PP 78-79.)

On March 8, 1996, school personnel held an MDC/IEP conference to plan Kelly's return to school after a period of excessive truancy and a hospital stay. (Pl.'s 12(M) P 23.) Kelly had indicated that she wanted to return to school and participate in a work program. (Pl.'s 12(M) P 23.) Consequently, Kelly began participating in an off-campus work experience program in the mornings and attending self-contained classes in the afternoon. (Pl.'s 12(M) P 24.) Nevertheless, Kelly's attendance and tardiness were still problematic. The IEP also indicated that Kelly was to receive psychological and/or social work related services, but did not indicate the quantity of services to be provided nor whether the services were direct or consultative. (Defs.' 12(M) P 99.)

In March 1996, Kelly's mother again discussed evaluating Kelly for a possible learning disability and signed a consent form to allow the evaluation. (Defs.' 12(M) PP 57-58; Pl.'s 12(N) P 57.) No one performed the requested evaluation. (Defs.' 12(M) P 58.) The School District states that this was because of the concern over the test-retest effect which can cause inflated scores. (Pl.'s 12(N) P 110.)

In February and March 1997, Kelly's mother obtained independent psychological and learning disabilities evaluations which indicated that Kelly had a specific learning disability that had not been identified by the School District. (Defs.' 12(M) P 61; Pl.'s 12(N) P 61.) Dr. Richard Guerra, a clinical psychologist, tested Kelly and recommended that "further testing be done to determine the nature and extent of

a learning disability." (A.R. at 1223.) An educational diagnostician, Mary Ellen Gavin, M.A., found that Kelly had a non-verbal learning disability, a language processing disorder, and moderate to severe dyslexia. (Defs.' 12(M) PP 64-65.)

D. Kelly's Out-of-School Behavioral Problems

Kelly continued to demonstrate significant behavioral problems into her sophomore year. During the 1995 Christmas break, Kelly moved out of the house and for a few days her mother did not know her whereabouts. (Pl.'s 12(M) P 17-18.) After a period of time, she began staying with a friend but did not attend school. (Pl.'s 12(M) P 18.) Kelly returned home after becoming ill, but only for two weeks, after which she moved back in with her friend. While living with her friend, Kelly, with a number of older companions reputed to be gang members, was picked up by the Blue Island Police Department for violating a curfew ordinance. (Pl.'s 12(M) P 20.) The police told Kelly to move back home and go back to school. (Pl.'s 12(M) P 21.) Kelly returned home, but brought her problems with her. (Pl.'s 12(M) P 22.) After an upsetting phone call, she tried to take a large kitchen knife to her room. (Pl.'s 12(M) P 22.) Kelly's mother fought with Kelly over the knife and was able to take it away from her. (Pl.'s 12(M) P 22.)

On February 24, 1996, Kelly's mother admitted her to the Hinsdale Hospital Adolescent Psychiatric Inpatient Program. (Pl.'s 12(M) P 23; A.R. at 1222.) Kelly was admitted for "'out-of-control' and runaway behavior, drug abuse, extreme oppositionality and defiance of home rules, low self-esteem and depression." (A.R. at 1222.) Kelly was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"),

Oppositional Defiant Disorder, and Polysubstance Abuse. (Defs.' 12(M) P 97.) This medical diagnosis was provided to the School District at the March 8, 1996, MDC/IEP meeting. (Defs.' 12(M) P 98.) Dr. Bernadino, the psychiatrist who treated Kelly at Hinsdale, prescribed Ritalin to address Kelly's ADHD, but Kelly refused to cooperate in taking the medication until July 1996. (Pl.'s 12(M) P 27.) On May 13, 1996, Kelly was again admitted to Hinsdale Hospital because she had again run away from home. (Pl.'s 12(M) P 25.)

E. Kelly's Move to Eagle Hill

In September 1996, Kelly's mother unilaterally withdrew Kelly from attendance at Oak Park and placed her at Eagle Hill School, a residential school in Massachusetts, which serves students with learning disabilities, ADHD, and emotional and behavioral difficulties. (A.R. at 1-2.) Eagle Hill School is not an ISBE-approved residential facility. (A.R. at 1-2.) At least one of the Eagle Hill staff members is special education certified and some of the teaching staff are certified in the Orton-Gillingham method of instruction in reading. (Defs.' 12(N) P 30.) Eagle Hill uses an IEP format that includes specific goals, short term objectives, evaluation criteria, and a narrative that discusses the student's progress. (Defs.' 12(M) P 163.) The school day is highly structured. (Defs.' 12(M) P 153.) Class size is small; most classes have only three to seven students while some have a one-to-one student-to-teacher ratio. (Defs.' 12(M) P 158; Pl.'s 12(N) P 169.)

Kelly has benefitted significantly from her placement at Eagle Hill during the 1996/97 school year, the 1997 summer term, and the 1997/98 school year. (Defs.' 12(M) P 143.) Eagle Hill is addressing her reading difficulties through one-to-one

instruction following the Orton-Gillingham method of teaching reading and reading comprehension. (Defs.' 12(M) P 171.) While at Eagle Hill, Kelly has passed all of her courses and her attendance has dramatically improved. (Defs.' 12(M) PP 145, 148.) In a positive reinforcement program in which students earn privileges, she has been consistently earning full privileges. (Defs.' 12(M) P 150.)

III. DUE PROCESS HEARINGS

A. Level One Hearing

On March 28, 1997, Kelly's mother filed a request for a special education due process hearing, seeking reimbursement for the cost of Kelly's placement at Eagle Hill and the cost of the independent evaluations. (Defs.' 12(M) P 8.) Impartial Hearing Officer ("IHO") Gregory Waas, Ph.D., conducted the Level I special education due process hearing on October 30, November 20, and December 10, 1997. (Defs.' 12(M) P 9.)

The IHO found that:

> the preponderance of the evidence indicates that the failure by the District to conduct an evaluation to investigate the presence of a learning disability was a serious oversight that understandably undermined the parents' confidence in the evaluation process and resulted in inconsistent and inadequate programming for [Kelly]'s reading deficits.

(A.R. at 1225.) The IHO went on to find that

> the District's response to [Kelly]'s clear and significant reading deficits, however, was much less systematic and must be judged as inadequate. . . . Given the District's inadequate response to Kelly's reading problems, the parents' decision to seek out independent evaluations and an alternative educational placement must be viewed as reasonable.

(A.R. at 1227.)

The IHO further found that

> many of the behavioral problems that led the parents to seek a 24-hour residential placement (e.g., drug/alcohol abuse, runaway behavior, home rule violations, negative peer involvement) took place outside of the school and cannot be viewed as school-related.

(A.R. at 1227.)

The IHO concluded that the Mother was entitled to reimbursement from the School District for "that portion of the Eagle Hill placement that is primarily related to her reading difficulties (i.e., tuition) . . . ." (A.R. at 1228.) However, the IHO concluded that the Mother was "not entitled to reimbursement for the portion of the Eagle Hill program (i.e., room and board) that is devoted to nonschool related behavioral problems." (A.R. at 1228.)

The Level I Decision granted partial relief to Kelly's parents, and ordered the School District to pay for only the educational costs, not room and board, incurred at Eagle Hill, 50 percent of transportation costs, and the costs of two independent evaluations conducted by Mary Ellen Gavin and Dr. Guerra. (A.R. at 1228.)

B. Level Two Hearing

Both parties appealed the Level I decision. (Defs.' 12(M) PP 12-13.) Level II Review Officer Julius Menacker conducted the Level II Special Education hearing on March 12, 1998. (Defs.' 12(M) P 15.) He heard no additional testimony. He found that the parties did not disagree regarding the facts developed at the Level I hearing, but rather on the interpretation of the facts as they relate to matters of law. (A.R. at 2.)

The Level II Review Officer found that

> the student's problematic behavior at home and school were [sic] intertwined. The evidence clearly indicates that services offered by the school, as disciplinary and truancy responses appropriate for non-disabled students, neglected the student's acknowledged BD condition, as well as the student's probable LD and HDLD conditions. These deficiencies constituted a denial of FAPE, as the student was not provided with services allowing her to receive educational benefit in

> her school placement. I further conclude that the facts and law indicate that residential placement for the student was appropriate.

(A.R. at 10.) The Level II Review Officer also found that the failure of the School District to respond to the MDC recommendation that psychological testing be conducted to better assess Kelly's possible learning disability was not a de minimis procedural violation. (A.R. at 10.)

The Level II Decision, issued on March 30, 1998, ordered the School District to pay for only one evaluation, and to reimburse the parents for the full costs, including transportation and room and board, at Eagle Hill from the date of enrollment through the 1998 Summer term. (A.R. at 13.)

C. Suit Filed in District Court

The School District appealed the Level II decision to this Court on April 17, 1998. (Defs.' 12(M) P 18.) Kelly filed a Motion for Statutory Injunction to Enforce the Level II Review Officer's Decision seeking an order requiring the School District to comply with the Review Officer's decision, and to pay all costs associated with Kelly's placement at Eagle Hill School pending final resolution. This Court granted the statutory injunction. See *Board of Educ. of Oak Park v. Illinois State Bd. of Educ., 10 F. Supp. 2d 971 (N.D. Ill. 1998).* Following entry of the injunction, the parties entered a settlement regarding Kelly's placement at Eagle Hill for the 1998/99 school year.

III. THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Courts engage in a two step inquiry in suits brought under the IDEA. First, the court asks whether the State has complied with the procedures set forth in the Act. Second, the court asks whether the individualized educational program developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits. If the state has met both of these requirements then it has complied with the obligations imposed by Congress. *Rowley, 458 U.S. at 206-07, 102 S. Ct. at 3051.*

A. Purpose of the IDEA

The purpose of the IDEA is

> to assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

20 U.S.C. § 1400(c). "The purpose of the IDEA is to open the door of public education to [disabled] children, not to educate a [disabled] child to her highest potential." *Heather S., 125 F.3d at 1054* (internal quotations and citations omitted). To receive financial assistance under the IDEA, states must assure that "a free appropriate public education will be available for all children with disabilities . . . ." and that

> all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

20 U.S.C. § 1412(2).

Educators tailor the "free appropriate public education" ("FAPE") required by the Act to the unique needs of the disabled child through an "individualized educational program" ("IEP"). *Rowley, 458 U.S. at 181, 102 S. Ct. at 3038.* The IEP is the "primary vehicle" of the IDEA's implementation. *Honig v. Doe, 484 U.S. 305, 310, 108 S. Ct. 592, 597, 98 L. Ed. 2d 686 (1988).* The IEP, mandated for each disabled child, is an educational plan developed specifically for the child by the local school district, the child's teacher, the parents or guardians, and, when appropriate, the child. *20 U.S.C. § 1401*(a)(20). "The IEP sets out the child's present educational performance, establishes annual and short-term objectives for improvements in that performance, and describes the specially designed instruction and services that will enable the child to meet those objectives." *Honig, 484 U.S. at 311, 108 S. Ct. at 598.* The IEP must be annually reviewed and revised when necessary. *20 U.S.C. § 1414*(a)(5). The IEP is the "centerpiece" of the IDEA, and "Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and

any subsequent assessment of its effectiveness." *Honig, 484 U.S. at 311, 108 S. Ct. at 598.*

B. Procedural Violations

The Court's first inquiry under Rowley is whether the School District has complied with IDEA procedures. See *Rowley, 458 U.S. at 206, 102 S. Ct. at 3051.* "Procedural flaws do not automatically require a finding of a denial of a [free appropriate public education]. However, procedural inadequacies that result in the loss of educational opportunity . . . clearly result in the denial of a [free appropriate public education]." *W.G. v. Board of Trustees, 960 F.2d 1479, 1484 (9th Cir. 1992).* Parents are entitled to reimbursement for the cost of a unilateral placement when the school district has violated the IDEA failing to follow the procedures set forth in the Act, which in turn results in a denial of a FAPE. *Board of Educ. of Murphysboro v. Illinois State Bd. of Educ., 41 F.3d 1162, 1168 (7th Cir. 1994).*

Both hearing officers found serious procedural violations which resulted in the loss of educational opportunity and denial of a FAPE. (A.R. at 10-11, 1226-27.) Kelly argues that numerous failures by the School District to adhere to the procedural requirements of the IDEA, some standing alone and certainly when combined, constituted a denial of a FAPE. The procedural violations alleged by Kelly are that: (1) the School District changed Kelly's placement in January 1995 without providing written notice and without convening an MDC/IEP meeting to discuss a plan for Kelly's changed placement in violation of *20 U.S.C. § 1401*(20) and 34 C.F.R. § 300.344; (2) the School district failed to adequately consider the diagnosis and recommendations of Dr. Bernadino

in violation of 23 Ill. Admin. Code § 226.542; (3) the School District failed to conduct the psychological evaluation requested by the MDC/IEP team at the April 5, 1995, MDC/IEP meeting and further failed to reconvene the MDC/IEP team or provide written notice to inform of its decision not to evaluate Kelly; (4) the School District failed to incorporate into Kelly's IEPs her initial or current levels of performance in violation of *20 U.S.C. § 1401*(a)(20)(A) and 34 C.F.R. § 300.346(a), resulting in no baseline by which to assess Kelly's progress; (5) the School District failed to conduct an annual review of Kelly's progress as mandated by *20 U.S.C. § 1414*(a)(5); (6) the goals and short term objectives provided in Kelly's IEPs were vague and meaningless, failing to meet state and federal standards and failing to provide any objective measurement criteria in violation of 34 C.F.R. § 300.346(a)(5); (7) the School District failed to provide short term objectives for some goals in Kelly's IEPs in violation of 34 C.F.R. § 300.346(a)(2); (8) the School District failed to incorporate a behavior management plan in violation of the Illinois School Code and failed to document the behavioral interventions that it used with Kelly; (9) the School District failed to reevaluate Kelly within three years of the prior evaluation in violation of 34 C.F.R. § 300.534(b); and (10) the School District failed to provide an individualized transition plan in the school year in which Kelly reached age fourteen-and-a-half.

The Level II Review Officer did not specifically address each alleged violation. He found the failure by the School District to provide formal notice of Kelly's change in placement in January 1995 was de minimis because the parents requested, knew of, and approved the change. (A.R. at 8.) The Review Officer also found that the School District's refusal to test Kelly in the spring of 1996 due to the "test, retest" effect

"cannot be held to be a fatal violation of the student's rights under IDEA." (A.R. at 8.) However, the Review Officer concluded that the failure of the School District to respond to the April 5, 1995, MDC recommendation to explore Kelly's possible LD was not de minimis. (A.R. at 10.) He also concluded that Kelly's IEP did not indicate appropriate responses to her LD and ADHD disabilities and the School District did not extend appropriate services to her. (A.R. at 10.) The Review Officer indicated that Kelly's continued failure, truancy, class cutting, and disciplinary problems provided evidence that appropriate services were not provided to Kelly. (A.R. at 10.)

The School District argues that the Review Officer's determination that the School District's procedural violations were not de minimis is based on an erroneous conclusion that Kelly was denied a FAPE. The School District contends that although it did not conduct an LD evaluation or place Kelly in an LD classroom, these oversights did not result in the loss of educational opportunity so as to deny Kelly a FAPE. The School District relies on the approach taken by the Heather S. court when it stated that "the IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education." *125 F.3d at 1055.* The School District argues that, regardless of whether Kelly's needs were correctly categorized, her needs were in fact being met in a manner reasonably calculated to provide her with some educational benefit: Kelly was placed in remedial reading classes, offered assistance by Dr. Haywood, and placed in the special education LD/BD reading class in her sophomore year.

The Court agrees with the Level II Review Officer that failure by the School District to provide formal notice to the

parents of Kelly's change in placement in January 1995 was de minimis because the parents requested, knew of, and approved the change. Giving "due weight" to the Review Officer's educational expertise, the Court also upholds his conclusion that the School District's refusal to test Kelly in the spring of 1996 due to the "test, retest" effect was not a fatal violation of Kelly's rights. Finally, the Court agrees with the Review Officer's conclusion that the failure of the School District to explore and respond to Kelly's possible LD was not de minimis and resulted in a denial of a FAPE.

The IDEA contemplates a special education designed to meet a disabled child's unique needs and seeks to assure the effectiveness of efforts to educate children with disabilities. *Rowley, 458 U.S. at 203, 102 S. Ct. at 3049.* An appropriate education specific to a disabled child's needs must begin with full recognition of the disability and assessment of its extent. School authorities cannot properly address problems which they do not understand. The School District did not merely mislabel or mischaracterize Kelly's disabilities, it failed to fully evaluate and understand them. Although the School District recognized that she had serious reading difficulties, it did not recognize and address her specific learning disabilities later identified by independent tests or take into account the effects of her ADHD diagnosis. The failure of the School District to conduct an evaluation to investigate the presence of a learning disability was a serious error and resulted in inconsistent and inadequate programming for Kelly's reading problems.

Relying on *Springer v. Fairfax County School Board, 134 F.3d 659, 664 (4th Cir. 1998),* the School District argues further that the Review Officer's conclusion that Kelly's continued failure and poor conduct provided evidence that she was not

receiving appropriate services is misplaced because a student's out-of-school conduct and unwillingness to cooperate does not render an individualized educational program designed for her inappropriate under the IDEA. The Springer court refused to equate "bad conduct" with a "serious emotional disturbance" that would bring a child under the ambit of the IDEA. Id. The Court finds Springer to be distinguishable on its facts. The student in Springer had never been identified as disabled by school authorities; numerous psychological reports and other evidence indicated that, although the student was "socially maladjusted," he could not be described as seriously emotionally disturbed; and the state review officer held that the student was not disabled under the IDEA. Id. In the instant case, Kelly has been identified by school authorities as BD and eligible for special education services since the eighth grade.

C. Substantive Inquiry

The Court's second inquiry under Rowley is whether the School District's proposed IEP was "reasonably calculated to enable the child to receive educational benefits." *458 U.S. at 207, 102 S. Ct. at 3051.* The issue is whether the School District's proposed placement was appropriate, "not whether another placement would also be appropriate, or even better for that matter." *Heather S., 125 F.3d at 1057.* The School District is required to provide an appropriate education, "not the best possible education, . . . or the placement the parents prefer." Id. The School District satisfies its requirements under the IDEA by

> providing personalized instruction with sufficient support services to permit the child to benefit

> educationally from that instruction. Such instruction and services must be provided at public expenses, must meet the state's educational standards, must approximate the grade levels [**34] used in the state's regular education and must comport with the child's IEP.

Rowley, 458 U.S. at 203, 102 S. Ct. at 3049. There is not "any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act." *Id. at 202, 102 S. Ct. at 3049.* The appropriate concern is finding a program which will be of educational benefit to the child. *Board of Educ. of Community Consol. Sch. Dist. No. 21 v. Illinois State Bd. of Educ., 938 F.2d 712, 717 (7th Cir. 1991).*

1. The School District's Proposed Placement Was Not Appropriate

In arguing that it fulfilled its requirements to Kelly under the IDEA, the School District relies on the single word "some" from Rowley: " implicit in the congressional purpose of providing access to a 'free appropriate public education' is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child." *458 U.S. at 200, 102 S. Ct. at 3048* (emphasis supplied). The School District argues that Kelly received some educational benefit while at Oak Park, as evidenced by her participation in the work program and her success in her reading strategies and social seminar classes and that Kelly's failure to obtain greater benefit from her Oak Park placement was due to her own unwillingness to try. The School District's analysis ignores the following statement contained in the same paragraph of Rowley. "We therefore

conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Id.

The Court finds that the School District's proposed placement was not appropriate. Rowley does not mean that a de minimis benefit is sufficient. See *M.C. v. Cent. Regional Sch. Dist., 81 F.3d 389, 393* (3d Cir.), cert. denied, *U.S., 117 S. Ct. 176 (1996)*. Kelly failed half of all her classes at Oak Park and, except for passing several pass/fail classes and making one B in Reading Strategies I, received Ds in the remaining half. This record demonstrates that the educational benefit that Kelly was receiving was minimal.

The School District failed to show that it properly addressed Kelly's school-related behavioral problems at Oak Park: her class cutting, truancy, and disciplinary problems. Although the Court recognizes that school authorities are hard pressed to force students to attend school, the Court agrees with the Level II Review Officer that the School District's interventions in Kelly's case were insufficient to meet the test set forth in Rowley of educational instruction specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction. *458 U.S. at 188-189, 102 S. Ct. at 3042*. The record demonstrates that Oak Park's responses to Kelly's behavioral problems did not address Kelly's unique problems. (A.R. at 8.) For instance, the attendance system was "automatically cranking out detentions and automatically cranking out pieces of paper . . ." to address Kelly's behavioral problems. (A.R. at 144.)

Furthermore, the Court finds that the School District's response to Kelly's reading difficulties was inadequate. The Level I Hearing Officer found that the School District failed to conduct an appropriate evaluation of Kelly's reading problems and provided Kelly with reading services in an "ad-hoc, somewhat piecemeal" manner. (A.R. at 1227.) The Hearing Officer found that the failure of the School District to achieve a comprehensive understanding of the scope and severity of Kelly's academic difficulties resulted in an inconsistent and fragmented approach to the remediation of Kelly's reading problems. (A.R. at 1224.)

> Although the District did periodically provide [Kelly] with remedial reading classes, no systematic and comprehensive plan to deal with her reading difficulties was ever developed. Such a failure was manifested . . . by the absence of any goals or objectives that specifically addressed these reading, deficits, the failure of the school to more aggressively attempt to ensure that prescribed reading tutoring was in fact delivered, and the failure to assign [Kelly] to a learning disabilities classroom.

(A.R. at 1224.) The Court agrees with the Hearing Officer's assessment of the record. This issue was not specifically addressed by the Level II Review Officer but falls within his general conclusion that Kelly was denied a FAPE. Therefore, the Court concludes that the School District's proposed educational placement for Kelly was not reasonably calculated to enable her to receive educational benefit.

2. Educational Placement at Eagle Hill

Having found the School District's proposed placement inappropriate, the Court must next address whether Kelly's placement at Eagle Hill was appropriate. *Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15, 114 S. Ct. 361, 366, 126 L. Ed. 2d 284 (1993).* The Court finds that Eagle Hill School is an appropriate educational placement for Kelly. This finding comports with the conclusions of the Level I Hearing Officer and the Level II Review Officer. At Eagle Hill, Kelly has demonstrated academic progress and has improved her attendance rate. Kelly's reading and reading comprehension is improving. Because the School District's proposed educational placement was inappropriate and Eagle Hill afforded an appropriate educational placement, Kelly's parents are entitled to retroactive reimbursement from the School District for the educational portion of Kelly's placement at Eagle Hill School from the point of enrollment through the 1997/1998 school term. See *School Comm. of Burlington v. Department of Educ., 471 U.S. 359, 370-71, 105 S. Ct. 1996, 2003, 85 L. Ed. 2d 385 (1985)* ("Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case. . . . Reimbursement merely requires the [school district] to belatedly pay expenses that it should have borne in the first instance had it developed a proper IEP.") The fact that Eagle Hill is not ISBE-approved and did not meet the IDEA definition of a FAPE is not a bar to reimbursement because such requirements do not apply to parental placements. See *Florence County Sch. Dist. v. Carter, 510 U.S. 7, 14, 114 S. Ct. 361, 365-66, 126 L. Ed. 2d 284 (1993).* The educational portion of Kelly's placement is the cost of tuition and related educational costs, if any, such as books.

3. Residential Placement Was Not Required

Having found that School district's proposed placement violated IDEA and that the educational placement at Eagle Hill was proper under the Act, the Court is authorized to "grant such relief as the court determines is appropriate." *20 U.S.C. § 1415*(e)(2). Under this provision, "equitable considerations are relevant in fashioning relief," *Burlington, 471 U.S. at 374, 105 S. Ct. at 2005,* and this Court enjoys "broad discretion" in fashioning the relief, *Burlington, [**40] 471 U.S. at 369, 105 S. Ct. at 2002.* This includes reimbursing parents for the costs of private special education if the court determines that such placement, rather than the proposed IEP, is proper. *Burlington, 471 U.S. at 369, 105 S. Ct. at 2002.* The Court must consider all relevant factors, including the appropriate and reasonable level of reimbursement. The Court is not required to provide total reimbursement if a portion of the cost was not reasonable or necessary. *Florence, 510 U.S. at 16, 114 S. Ct. at 366.*

Regulations provide that an appropriate education may require residential placement:

> If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

34 C.F.R. § 300.302.

The Court must determine whether Kelly's placement "may be considered necessary for educational purposes, or

whether the placement is a response to medical, social, or emotional problems that is necessary quite apart from the learning process." *Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635, 643 (9th Cir. 1990).* Clovis involved a seriously emotionally disturbed child who was entitled to special education and related services and required residential placement in order to receive an appropriate education. *Id. at 639.* The primary issue before the court was whether hospitalization at an acute care psychiatric facility constituted either a residential placement or a related service, for which the school district was financially responsible, or an excludable medical service. In determining that the school district was not financially responsible for the placement, while the psychiatric hospitalization was perhaps necessary for the child's continued mental health, the Clovis court rejected the premise that "where medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem, the states remain responsible for the entire cost of the placement." *Id. at 643* (internal quotations and citations omitted). The Seventh Circuit appears to agree with this conclusion when it held that in such situations, the Court should defer to the factual decisions of the hearing officer as to whether the service is a "related service." *Morton Comm. Unit Sch. Dist. No. 709 v. J.M., 152 F.3d 583, 587.*

The Court finds that twenty-four hour residential placement for Kelly was primarily for noneducational reasons. Kelly's residential placement was due to her uncontrolled out-of-school behavior: substance abuse, runaway behavior, defiance of home rules, and involvement with a negative peer group. The Level I Hearing Officer determined that

> [o]ral testimony by both [Kelly]'s parents and Dr. Bernadino (Hinsdale Hospital psychiatrist) indicated that, at the time of her placement at Eagle Hill, [Kelly] needed such 24-hour structure due to her noncompliance with home rules, runaway behavior, polysubstance abuse, and involvement with a negative peer group. The preponderance of evidence indicated that these behaviors took place almost exclusively outside of school.

(A.R. at 1225.) Dr. Bernadino advocated for Kelly's residential placement based primarily on concern about Kelly's uncontrolled behavior:

> [Kelly] could have the greatest placement in the world, but after school hours . . . she would still do what she wanted to do. She could still run away. . . . Unless she is tied to a post in the house . . . until she's ready the next day to go to a therapeutic school, its not going to work.

(A.R. at 522.) In a March 31, 1997, letter, Dr. Bernadino stated:

> It is my strong opinion that sending [Kelly] to a residential program with a therapeutic school component was the only alternative that was left in order to help this child. The consequences of not being in a therapeutic school for an extended period of time would include drug and alcohol use, non-compliance with any form of treatment and most likely continued

> running away and continued defiance of all authority figures and possibly patient getting hurt herself or hurting someone.

(A.R. at 742.) Dr. Bernadino's expressed concerns for Kelly's welfare were valid but nevertheless related to Kelly's life outside of school.

[21] The Court finds that twenty-four hour residential placement for Kelly was primarily for noneducational reasons. The Level II Review Officer found that Kelly's "problematic behavior at home and school were intertwined" and that residential placement was appropriate. (A.R. at 10.) Indeed, Kelly's problems are complex. However, the Court concurs with the Clovis court that a school district does not remain responsible for the entire cost of a placement when that placement was made due to multiple problems that are intertwined with the educational problems. See *Clovis, 903 F.2d at 643*. The Court agrees with the Level I Hearing Officer's assessment that the preponderance of the evidence indicated that Kelly needed a twenty-four hour structure due to behaviors that took place almost exclusively outside of school.

Although a residential school may be the best place for Kelly considering her problems, it is not required to address her educational needs. Therefore, the School District is not required to reimburse Kelly's parents for the costs associated with her room and board at Eagle Hill or transportation costs to and from Massachusetts. This conclusion is further buttressed by statements from Kelly's counsel during oral argument on these motions, in which counsel acknowledged that the educational structure and programs found at Eagle Hill were also available from private schools in the Chicago

area. The Mother's decision to enroll Kelly in Eagle Hill was made not only to find a suitable educational program, but also to remove Kelly from her local friends with whom she was getting into serious trouble and facing possible personal harm and from her home environment where she was in conflict with her family.

4. Reimbursement for Independent Evaluations

Defendants argue that they are entitled to reimbursement for two independent evaluations which they obtained for Kelly at their own expense. These involved both IQ and psychological testing to evaluate Kelly for possible learning disabilities. Defendants argue that they should be reimbursed for the two evaluations because such evaluations were the responsibility of the School District and the Mother obtained the evaluations independently only after the School District failed to do so. The Level II Review Officer concluded that the Defendants were entitled to reimbursement for only one of the two independent evaluations, that is, for the one conducted by Mary Ellen Gavin and not the one conducted by Dr. Guerra. This determination is fully supported by the case law and the regulations. *Board of Educ. of Murphysboro v. Illinois State Bd. of Educ., 41 F.3d 1162, 1169 (7th Cir. 1994)* ("section 300.503(b) limits reimbursement to a single evaluation") and 34 C.F.R. § 300.503.

The School District argues that because Defendants did not appeal the Level II hearing officer's decision, Defendants may not now argue that they are entitled to reimbursement for both independent evaluations. Such an argument is persuasive to the extent that the there is an analogy between an appeal from a hearing officer's decision to the district court and an

appeal from a district court to an appellate court. "It is well-established, however, that an appellee may not attack a judgment in order to enlarge his own rights thereunder without filing a cross-appeal." *Tredway v. Farley, 35 F.3d 288, 296 (7th Cir. 1994).*

[24, 25] The Court holds that appeals from administrative hearing officers should be treated similarly to appeals from a district court because the IDEA provides that a party dissatisfied with a hearing officer's decision may appeal to a United States District Court. *20 U.S.C. § 1415.* In Defendants' answer, they admitted that the Level II Hearing Officer ordered the School District to reimburse the Mother for the costs of only Mary Ellen Gavin's evaluation of Kelly. (Defs.' Answer P 19c.) In addition, in their prayer for relief, they only asked that the Level II administrative decision be affirmed and made no mention of their request that they be reimbursed for both independent evaluations. (Defs.' Answer at 8.) In their briefs in connection with these motions, Kelly and her mother request that the Level II Decision be affirmed. (Br. at 51; Reply Br. at 22). In light of the above facts, Defendants cannot demand enlarged relief when they never appealed from the Level II Review Officer's decision by means of a complaint or counterclaim.

5. Defendants' Additional Claims

Defendants assert several additional claims for both compensatory education and reimbursement for private therapy. However, as noted in section four above, they failed to appeal from any decision with which they were dissatisfied. Consequently, for the reasons stated in section four above, these claims too are denied.

a. Defendants' Claim for Compensatory Education

[26-28] Alternatively, this Court would deny Defendants' claim for compensatory education because it is not ripe. Defendants argue that compensatory education is an appropriate remedy because Kelly was denied a FAPE and she made little or no academic progress for the two years that she attended the public high school within the School District. A court award of compensatory education requires a school district to provide education either during the summer months or past a child's twenty-first birthday to make up for any earlier deprivation. *M.C. v. Central Reg'l Sch. Dist., 81 F.3d 389, 395 (3d Cir. 1996).* The Third Circuit has formulated a standard for an award of compensatory education, stating that "the right to compensatory education should accrue from the point that the school district knows or should know of the IEP's failure" allowing, however, for the school district to have some time reasonably required to rectify the problem. *Id. at 396.* But see *Garro v. Connecticut, 23 F.3d 734, 737 (2d Cir. 1994)* (requiring a "gross procedural violation" for an award of compensatory education). However, the IDEA requires a FAPE between the ages of three and twenty-one. *20 U.S.C. § 1412.* Thus, an award which requires the provision of educational services during that period of time cannot constitute an award of compensatory education. *Manchester Sch. Dist. v. Christopher B., 807 F. Supp. 860, 868-69 (D.N.H. 1992).* In that Kelly is still only 18, and the parties have settled the issue of Kelly's 1998/99 academic year at Eagle Hill, the issue of prospective compensatory education is now moot.

b. Defendants Claim for Reimbursement for Private Therapy

[29] Alternatively, this Court would deny Defendant's claim for reimbursement for private therapy because they failed to meet their burden of proof. Neither the Level I nor the Level II Hearing Officers' decisions addressed the Defendants' claim for reimbursement for private therapy even though both were presented with the issue. Defendants argue that *Max M. v. Illinois State Board of Education, 629 F. Supp. 1504, 1518 (N.D. Ill. 1986),* supports their position that Kelly's parents should be reimbursed for the therapy. In Max M., the Court reimbursed parents for the costs of obtaining private therapy when the school district's psychologist recommended intensive psychotherapy for Max and stated that Max would not experience academic success without such therapy, and the school district provided absolutely no therapy to Max. *Id. at 1518-19.* It is true in Kelly's case that the March 8, 1996, IEP indicated that Kelly should receive psychological and social work services and included no commitment to a number of minutes per week; however, unlike Max M., Defendants have not proved that the school completely failed to provide those services. The school made an effort to provide Kelly with social work services. Defendants do not provide many details of the factual circumstances under which Kelly's parents sought therapy for her, nor do they argue that therapy was sought for primarily educational reasons. In some situations a free appropriate public education may include both instruction in residential facilities and related support services such as psychological counseling, see *Janzen v. Knox County Board of Education, 790 F.2d 484, 486 (6th Cir. 1986);* however, the Defendants have failed to meet their burden of proof.

IV. SCHOOL DISTRICT'S CLAIM FOR REIMBURSEMENT FROM THE ISBE

The School District's motion for summary judgment on Count II of the complaint asks the ISBE to reimburse the School District if the School District is required to pay for the costs of Kelly's Eagle Hill placement and attorney's fees. The School District argues that it should be reimbursed because Defendant's regulations and practices conflict with the Supreme Court's decision in *Florence County School District Four v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993).*

A. The Regulations

The IDEA provides

> The term "free appropriate public education" means special education and related services that –
>
> (A) have been provided at public expense, under public supervision and direction without charge,
>
> (B) meet the standards of the State educational agency,
>
> (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401.

Illinois has passed legislation implementing the IDEA.

A school district making tuition payments pursuant to this Section is eligible for reimbursement from the State for the amount of such payments actually made in excess of the district per capita tuition charge for students not receiving special education services.

* * *

If a child has been placed in an approved individual program and the tuition costs, including room and board costs, have been approved by the Review Board, then such room and board [**52] costs shall be paid by the appropriate State agency subject to the provisions of Section 14-8.01 of the Act.

105 ILCS 5/14-7.02.

The Illinois statute goes on to direct the ISBE to promulgate the necessary regulations. 105 ILCS 5/14-7.02. The ISBE adopted the necessary regulations. "A program not approved in accordance with the requirements of this Part shall not be used by school districts to serve students with disabilities under Section 14-7.02 of the School Code." 23 Ill. Adm. Code § 401.10. Other sections of the regulations have additional relevant provisions.

In addition, no school district shall place any student in a non-public special education program, nor shall any program accept placement of any student under Section 14-702 of the School Code, unless all the following conditions have been met.

1) The program has been approved by the State Board of Education for the school year for which placement is sought.

2) The allowable costs for the program have been established pursuant to Section 14-7.02 of the School Code.

3) The district has made the certification of inability to meet the student's needs to the State Superintendent of Education required pursuant to Section 14-7.02 of the School Code and the State Superintendent has found the district in substantial compliance with Section 14-4.01 of the School Code.

4) The program has been approved by the State Board of Education for the student's primary and secondary disabilities.

5) The program has been approved by the State Board of Education for the age range that includes the age of the student.

6) The district has determined that all educational programming and related services specified on the student's IEP will be provided to the student by the facility. The use of a nonpublic

> facility does not relieve the district of the responsibility for providing all programming and related services required by the IEP.

23 Ill. Adm. Code § 226.430. These regulations prohibit a school district from placing a student in a non-ISBE approved facility and receiving reimbursement from ISBE for that placement.

B. The Current ISBE Formula Applies to Eagle Hill

The School District directs the Court's attention to the case of *Florence County School District Four v. Carter, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284,* (1993). Carter held that parents' failure to select a program approved by the state in favor of an unapproved placement is not a bar to reimbursement. *Id. at 13.* The School District argues that the ISBE's regulations do not conform to Carter because the regulations force the School District into a Catch 22: it can either litigate cases such as Kelly's in a due process hearing and undertake all the attendant costs, or it can reimburse parents for private placement without recourse to the ISBE. The School District argues that under the holding of Carter the normal reimbursement system is insufficient in the present case because of the extra costs involved in defending its position in litigation.

However, the Supreme Court tailored its holding narrowly in Carter:

> This case presents the narrow question whether Shannon's parents are barred from reimbursement because their private school in which Shannon enrolled

> did not meet the § 1401(a)(18) definition of a "free appropriate public education." We hold that they are not, because § 1401(a)(18)'s requirements cannot be read as applying to parental placements.

Id. at 13. The school district in Carter argued that allowing reimbursement to parents who send their children to unapproved schools would put an unreasonable burden on financially strapped school districts. *Id. at 15.* However, the Court responded

> public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things; give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

Id. Thus, the case did not address the issue of whether a school district was barred from reimbursement from the state, only whether a parent was barred from reimbursement.

[30] A Fourth Circuit case has addressed the issue of, as between the state educational agency ("SEA") and the local educational agency ("LEA"), which agency should be liable for the costs of reimbursing a parent for a private placement. *Gadsby v. Grasmick, 109 F.3d 940, 954 (4th Cir. 1997).* The court noted that the SEA is the agency ultimately responsible for ensuring compliance with the IDEA. Id. However, the court went onto note that "both the language and the structure of IDEA suggest that either or both entities

may be held liable for the failure to provide a free appropriate public education, as the district court deems appropriate after considering all relevant factors." *Id. at 955* (citing *Carter, 510 U.S. at 16, 114 S. Ct. at 366).* One relevant factor the district court should consider in fashioning relief is the relative responsibility of each agency for the failure to provide a child with a FAPE. Id. Another relevant factor is the appropriate level of reimbursement that should be awarded. Id. The court held that district judges have broad discretion in granting relief under the IDEA and that such relief can permissibly include reimbursement to parents of their costs of a private placement awarded against the SEA, LEA, or both. Id.

The ISBE argues that the School District should bear the entire cost because the School District violated the IDEA, and that such a result would encourage full compliance by School Districts. The ISBE goes on to argue that the consequence for failing to comply with the IDEA should be the burden of reimbursing the parents for the costs of placing the student in a private institution.

The Court concludes that the most equitable outcome is one which places the burden of reimbursing the parents for the costs of Kelly's placement at Eagle Hill on both parties under the formula currently in place for approved placements. The Court reaches this conclusion for a number of reasons. First, the Court recognizes the dilemma that the School District faces in the present situation: either litigate and undertake the associated costs even when it wins or leave itself at the mercy of the State and possibly not get reimbursed. Second, the School District should bear a portion of the costs of reimbursement because of its failure to provide Kelly with a FAPE. Third, the ISBE is the agency ultimately responsible for

ensuring compliance with the IDEA and is responsible for creating the dilemma for the School District. *Gadsby v. Grasmick, 109 F.3d 940, 954 (4th Cir. 1997).* Further, even though the Gadsby court placed the financial burden on the school district, the holding in that case did not preclude dividing the costs between the SEA and LEA. This outcome should encourage the ISBE to endeavor to ensure compliance with the IDEA not just at an administrative and regulatory level but also on a individual case-by-case basis.

In addition, the two factor test provided in Gadsby also supports this result. The first factor calls for assessing the relative responsibility of each agency for the failure to provide a child with a FAPE. Id. In this case, while it was the School District which was primarily at fault for failing to provide Kelly with a FAPE, the degree of the School District's fault was not unlimited. The School District had made efforts to provide Kelly with a FAPE. The issues involved are complex and require a great deal of judgment and discretion on the part of educators and parents. The Court's finding that the School District failed to provide Kelly with a FAPE does not mean that they were not concerned with Kelly and her education.

C. Attorney's Fees

The final issue is the question of attorney's fees. Pursuant to *20 U.S.C. § 1415*(e)(4)(B) "the court, in its discretion, may award reasonable attorney's fees as part of the costs to the parents or guardian of a handicapped child or youth who is the prevailing party." Kelly and her Mother are the prevailing party and are entitled to an award of attorney's fees for their work in this case. The standards governing the award are set forth in the statute. *20 U.S.C. § 1415*(e)(4)(C). In

the exercise of its discretion the Court holds that any attorney's fees and costs awarded to the Mother shall be divided equally between the School District and the ISBE because, as previously discussed, both share substantial responsibility for this situation.

V. CONCLUSION

For the foregoing reasons, the Court grants in part and denies in part the School District's motion for summary judgment against Kelly and her mother and grants in part and denies in part Kelly and her mother's cross motion for summary judgment. The School District is ordered to reimburse Kelly's parents for the tuition costs and related educational costs of Kelly's placement at Eagle Hill School from the time of enrollment through the 1997/1998 school term. The School District is ordered to reimburse Kelly's parents for the costs of her evaluation by Mary Ellen Gavin.

The School District's motion for summary judgment against the ISBE is granted in part and denied in part. The ISBE shall reimburse the School District in accordance with its existing formula for approved placements and the School District and the ISBE shall equally share any award of attorney's fees and court costs made to Kelly and her mother in this case.

Counsel shall file a petition for reimbursement of tuition and related educational costs, the evaluation by Mary Ellen Gavin, and attorney's fees and court costs within fourteen days, and the School District and ISBE shall meet with counsel to attempt to resolve this issue or shall file specific

objections within 21 days thereafter. The Court will enter a final judgment after the amounts have been determined.

SO ORDERED THIS 15TH DAY OF OCTOBER, 1998.

MORTON DENLOW
United States Magistrate Judge

APPENDIX C

20 U.S.C § 1411.

Section 1411 states, in pertinent part, as follows:

§ 1411. Authorization; allotment; use of funds; authorization of appropriations

(a) Grants to States

(1) Purpose of grants

The Secretary shall make grants to States and the outlying areas, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this subchapter.

(2) Maximum amounts

The maximum amount of the grant a State may receive under this section for any fiscal year is -

(A) the number of children with disabilities in the State who are receiving special education and related services -

(i) aged 3 through 5 if the State is eligible for a grant under section 1419 of this title; and

(ii) aged 6 through 21; multiplied by

(B) 40 percent of the average per-pupil expenditure in public elementary and secondary schools in the United States.

* * *

(f) State-level activities

(1) General

(A) Each State may retain not more than the amount described in subparagraph (B) for administration and other State-level activities in accordance with paragraphs (2) and (3).

(B) For each fiscal year, the Secretary shall determine and report to the State educational agency an amount that is 25 percent of the amount the State received under this section for fiscal year 1997, cumulatively adjusted by the Secretary for each succeeding fiscal year by the lesser of -

(i) the percentage increase, if any, from the preceding fiscal year in the State's allocation under this section; or

(ii) the rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor.

(C) A state may use funds it retains under subparagraph (A) without regard to -

(i) the prohibition on commingling of funds in section 1412(a)(18)(B) of this title; and

(ii) the prohibition on supplanting other funds in section 1412(a)(18)(C) of this title.

(2) State administration

(A) For the purpose of administering this subchapter, including section 1419 of this title (including the coordination of activities under this subchapter with, and providing technical assistance to, other programs that provide services to children with disabilities) -

(i) each State may use not more than twenty percent of the maximum amount it may retain under paragraph (1)(A) for any fiscal year of $500,000 (adjusted by the cumulative rate of inflation since fiscal year 1998, as measured by the percentage increase, if any, in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor Statistics of the Department of Labor), whichever is greater; and

(ii) each outlying area may use up to five percent of the amount it receives under this

section for any fiscal year or $35,000, whichever is greater.

(B) Funds described in subparagraph (A) may also be used for the administration of subchapter III of this chapter, if the State educational agency is the lead agency for the State under that subchapter.

(3) Other State-level activities

Each State shall use any funds it retains under paragraph (1) and does not use for administration under paragraph (2) for any of the following:

(A) Support and direct services, including technical assistance and personnel development and training.

(B) Administrative costs of monitoring and complaint investigation, but only to the extent that those costs exceed the costs incurred for those activities during fiscal year 1985.

(C) To establish and implement the mediation process required by section 1415(e) of this title, including providing for the costs of mediators and support personnel.

(D) To assist local educational agencies in meeting personnel shortages.

(E) To develop a State Improvement Plan under part A of subchapter IV of this chapter.

(F) Activities as the State and local levels to meet the performance goals established by the State under section 1412(a)(16) of this title and to support implementation of the State Improvement Plan under part A of subchapter IV of this chapter if the State receives funds under that subpart.

(G) To supplement other amounts used to develop and implement a Statewide coordinated services system designed to improve results for children and families, including children with disabilities and their families, but not to exceed one percent of the amount received by the State under this section. This system shall be coordinated with and, to the extent appropriate, build on the system of coordinated services developed by the State under subchapter III of this chapter.

(H) For subgrants to local educational agencies for the purposes described in paragraph (4)(A).

(4)(A) Subgrants to local educational agencies for capacity - building and improvement

In any fiscal year in which the percentage increase in the State's allocation under this section exceeds the rate of inflation (as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published by the Bureau of Labor

Statistics of the Department of Labor), each State shall reserve, from its allocation under this section, the amount described in subparagraph (B) to make subgrants to local educational agencies, unless that amount is less than $100,000, to assist them in providing direct services and in making systemic change to improve results for children with disabilities through one or more of the following:

(i) Direct services, including alternative programming for children who have been expelled from school, and services for children in correctional facilities, children enrolled in State-operated or State-supported schools, and children in charter schools.

(ii) Addressing needs or carrying out improvement strategies identified in the State's Improvement Plan under part A of subchapter IV of this chapter.

(iii) Adopting promising practices, materials, and technology, based on knowledge derived from education research and other sources.

(iv) Establishing, expanding, or implementing interagency agreements and arrangements between local educational agencies and other agencies or organizations concerning the provision of services to children with disabilities and their families.

(v) Increasing cooperative problem-solving between parents and school personnel and promoting the use of alternative dispute resolution.

(B) Maximum subgrant

For each fiscal year, the amount referred to in subparagraph (A) is -

(i) the maximum amount the State was allowed to retain under paragraph (1)(A) for the prior fiscal year, or for fiscal year 1998, 25 percent of the State's allocation for fiscal year 1997 under this section; multiplied by

(ii) the difference between the percentage increase in the State's allocation under this section and the rate of inflation, as measured by the percentage increase, if any, from the preceding fiscal year in the Consumer Price Index For All Urban Consumers, published b the Bureau of Labor Statistics of the Department of Labor.

(5) Report on use of funds

As part of the information required to be submitted to the Secretary under section 1412 of this title, each State shall annually describe -

(A) how amounts retained under paragraph (1) will be used to meet the requirements of this subchapter;

(B) how those amounts will be allocated among the activities described in paragraphs (2) and (3) to meet State priorities based on input from local educational agencies; and

(C) the percentage of those amounts, if any, that will be distributed to local educational agencies by formula.

(g) Subgrants to local educational agencies

(1) Subgrants required

Each State that receives a grant under this section for any fiscal year shall distribute any funds it does not retain under subsection (f) of this section (at least 75 percent of the grant funds) to local educational agencies in the State that have established their eligibility under section 1413 of this title, and to State agencies that received funds under section 1414A(a) of this title for fiscal year 1997, as then in effect, and have established their eligibility under section 1413 of this title, for use in accordance with this subchapter.

(2) Allocations to local educational agencies

(A) Interim procedure

For each fiscal year for which funds are allocated to States under subsection (d)(2) of this section, each State shall allocate funds under paragraph (1) in accordance with section 1411(d) of this title, as in effect prior to June 4, 1997.

(B) Permanent procedure

For each fiscal year for which funds are allocated to States under subsection (e) of this section, each State shall allocate funds under paragraph (1) as follows:

(i) Base payments

The State shall first award each agency described in paragraph (1) the amount that agency would have received under this section for the base year, as defined in subsection (e)(2)(A) of this section, if the State had distributed 75 percent of its grant for that year under section 1411(d) of this tile, as then in effect.

(ii) Allocation of remaining funds

After making allocations under clause (i), the State shall –

(I) allocate 85 percent of any remaining funds to those agencies on the basis of the relative numbers of children enrolled in public and private elementary and secondary schools wi hin the agency's jurisdiction; and

(II) allocate 15 percent of those remaining funds to those agencies in accordance with their relative numbers of children living in poverty, as determined by the State educational agency.

(3) Former chapter 1 state agencies

(A) To the extent necessary, the State -

(i) shall use funds that are available under subsection (f)(1)(A) of this section to ensure that each State agency that received fiscal year 1994 funds under subpart 2 of part D of chapter 1 of Title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 2791 et seq.] receives, from the combination of funds under subsection (f)(1)(A) of this section and funds provided under paragraph (1) of this subsection, an amount equal to -

(I) the number of children with disabilities, aged 6 through 21, to whom the agency was providing

special education and related services on December 1 of the fiscal year for which the funds were appropriated, subject to the limitation in subparagraph (B); multiplied by

(II) the per-child amount provided under such sub-part for fiscal year 1994; and

(ii) may use those funds to ensure that each local educational agency that received fiscal year 1994 funds under that subpart for children who had transferred from a State-operated or State-supported school program assisted under that subpart receives, from the combination of funds available under subsection (f)(1)(A) of this section and funds provided under paragraph (1) of this subsection, an amount for each such child, aged 3 through 21 to whom the agency was providing special education and related services on December 1 of the fiscal year for which the funds were appropriated, equal to the per-child amount the agency received under that subpart for fiscal year 1994.

(B) The number of children counted under subparagraph (A)(i)(I) shall not exceed the number of children aged 3 through 21 for whom the agency received fiscal year 1994 funds under subpart 2 of part D of chapter 1 of title I of the Elementary and

Second Education Act of 1965 [20 U.S.C.A. § 2791 et seq.].

(4) Reallocation of funds

If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all children with disabilities residing in the area served by that agency with State and local funds, the State educational agency may reallocate any portion of the funds under this subchapter that are not needed by that local agency to provide a free appropriate public education to other local educational agencies in the State that are not adequately providing special education and related services to all children with disabilities residing in the areas they serve.

APPENDIX D

Arizona

AZ ADC R7-2-402

Funding For Districts With Approved Programs.

A. No child may be placed by the local school district ("LEA") in a private school special education program unless the facility has been approved as meeting the standards as outlined in this rule, and the LEA assures that it is unable to provide satisfactory education and services through its own facilities and personnel.

A.R.S. § 15-765

Special education in rehabilitation, corrective or other state and county support institutions, facilities or homes.

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D. A school district or county school superintendent may contract with, and make payments to, other public or private schools, institutions and agencies approved by the division of special education, within or without the school district or county, for the education of and provision of services to children with disabilities if the provisions of section 15-766 and the conditions and standards prescribed by the division of special education have been met and if unable to provide satisfactory education and services through its own facilities and personnel in accordance with the rules prescribed by the state board of education.

Idaho

10 ADC 08.02.01.400

Funding for Districts With Approved Programs.

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The State Department of Education will determine if public and private schools and facilities meet state standards for an approved special education program. Any agency aggrieved by the Department of Education's final decision may appeal that decision in the State Board Education.

Idaho Code § 33-1002B (1999)

§ 33-1002B. Pupil tuition-equivalency allowances

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2. Districts which education school age special education students who, due to the nature and severity of their disabilities are residing in licensed public or private residential facilities or homes, and whose parents are not patrons of the district, shall be eligible for an allowance equivalent to the previous year's certified local annual tuition rate per child plus the excess cost rate that is annually determined by the state superintendent of public instruction. This district allowance shall be in addition to exceptional education support unit funding and included in district apportionment payments, subject to approval of district applications by the state superintendent of public instruction.

Connecticut

CT ADC § 10-76d-17

Private facilities.

A board of education may place a child requiring special education and related services in a private facility.

(a) Requirements. Each board of education shall ensure that any placement in a private facility is made in accordance with the following requirements.

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(4) The private facility shall be approved as set forth in section 10-76d-17(d) of these regulations.

Conn. Gen. Stat. § 10-76d

Duties and powers of boards of education to provide special education programs and services. Determination of eligibility for Medicaid. State agency placements; apportionment of costs. Relationship of insurance to special education costs.

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(d) To meet its obligations under sections 10-76a to 10-76g, inclusive, any local of regional board of education may make agreements with another such board or subject to the consent of the parent or guardian of any child affected thereby, make agreements with any private school or with any public or private agency or institution, including a

group home to provide the necessary programs or services, but no expenditures made pursuant to a contract with a private school, agency or institution for such special education shall be paid under the provisions of section 10-76g, unless ... (13) commencing with the 1987-1988 school year and for each school year thereafter, each such private school, agency or institution has been approved for special education by the Commissioner of education or by the appropriate agency for facilities located out of state, except as provided in subsection (b) ...

***

(f) No children placed out primarily for special education services shall be placed in a private school, agency or institution outside of the state, except when in the opinion of the Commissioner of Education it is determined that: . . . (2) no public or approved private facility which can reasonably provide suitable special education programs for such children is available in the state and the out-of-state placement is required for a period of time not to exceed two years, ...

Georgia

GA ADC G 160-4-7-.09

Instructional Support Services - Special Programs

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(10) Grant for Residential and Reintegration Services.

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(b) Procedures.

1. In the event that a local school system is unable to provide appropriate special education and related services to a student with disabilities within the boundaries of the local school system, within a regional program operated by the public school systems or within an educational setting operated by the State of Georgia, referral may be made to a private school or facility that is supported by the Georgia Department of Education.

Massachusetts

MA ST 71B § 4

Agreements between school committees with public or private schools

The school committee of any city, town or school district may, to meets its obligations under section three, with the approval of the department enter into an agreement

with any other school committee to jointly provide special education or, subject to the consent of the parent or guardian affected thereby and subject to constitutional limitations, may enter into an agreement with any public or private school, agency, or institution to provide the necessary special education within the city, town or school district. . .

Delaware

DE ST TI 14 § 3124

Private placement with financial aid

(a) Private placement with financial aid shall be granted, only to a "complex, or rare" disabled person defined as a person in the chronological age group 4 through 20 years inclusive, who is found to suffer from 2 or more of the defined disabilities, or who is so severely afflicted by a single disability, that the total impact of the condition means that he or she cannot benefit from the regularly offered free appropriate public educational programs. The determination shall be made by a committee appointed by the local board of education for identification, placement, review and dismissal of disabled persons and by the Department of Education that no school district or other state agency has a suitable free and appropriate program of education for the particular person. Such private placement shall be in a school/institution approved by the Department of Education. The Department shall make the final determination concerning the designation of a person eligible under this definition.

Kentucky

KRS § 157.280

Special education program furnished by district other than that of child's residence, or privately - Sharing costs - Transportation - Transportation to and from state schools for the deaf and blind

(1) If the number of children of school age in one (1) classification of exceptionality in a district is not sufficient to justify a special education program for that exceptionality, the board shall provide a program by contract with another county or independent district or private organization that maintains a special education program approved by the Kentucky Board of Education for that exceptionality.

Alabama

AL ST § 16-39-6

School board plans

During the fifth year of implementation of the incremental five-year plan referred to above, each school board shall submit a long-range plan for providing appropriate instruction and special services for exceptional children and shall submit said long-range plan to the State Board of Education for its review and approval or disapproval. Such plan, unless thereafter modified with approval of the State Board of Education shall be adhered to by the school board. Said long-range plans, and all modifications thereof, shall be

resubmitted to the State Board of Education for its review and approval or disapproval at such intervals as may be established by the said state board in regulations, but not in any event less often than once every seven years or more often than once every two years. Disapproval of a plan or any amendments thereto shall be only because of failure of the plan to meet minimum standards set out in regulations of the state board adopted in accordance with Section 16-39-5. and any such disapproval must specify in detail the reasons for such disapproval. The procedure for approving, disapproving, establishing and enforcing such long-range plans shall be the same as that set forth hereinabove for the incremental five-year plans and the long-range plans shall include such provisions as may be appropriate for the following:

***

(5) Payment of tuition and other costs for attendance at appropriate semipublic or private schools or institutions which may be able to provide appropriate services for all or some exceptional children in comparison with that which can be provided through the school system, such as, for example: Children's Center of Montgomery and Opportunity Center School in Birmingham. . . . Such payment shall, however, be limited to the extent that the child's needs cannot be met in the schools and further limited to private institutions which are approved or accredited for such training by the State Board of Education.

Maine

ME ST T. 20-A § 7201

Policy and purpose.

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C. An exceptional student may be placed in a residential school or institution or in a private day school or program, only after supporting evaluative data justifying the placement have been submitted to and approved by the commissioner.

ME ST T. 20-A § 7252-A.

Special education programs approval

Special education program may be established for the delivery of special education services to exceptional students in accordance with section 7204, subsection 4. A special education program may be offered by a school administrative unit, approved private school or a state licenced agency. . . .

New Mexico

NM ST § 22-13-8

Special education; private

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C. All agreements between local school boards and private nonsectarian, nonprofit educational training centers must be approved by the state superintendent. . . .

North Carolina

NC ST § 115C-115

Placements in private schools, out-of-state schools and schools in other local educational agencies.

The board shall adopt rules and regulations to assure that:

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(2) No child shall be placed by the Board or by the local educational agency in a private or out-of-state school unless the Board has determined that the school meets standards that apply to State and local educational agencies and that the child so placed will have all the rights he would have if served by a State or local education agency.

North Dakota

ND ST 15-59-07

Contracts for students with disabilities to attend private or out-of-state public schools

. . . No school district may enter a contract with any private nonsectarian nonprofit corporation or out-of-state public school for the education of any student having a physical or learning disability, unless the services provided by the school and the contract have been approved in advance by the superintendent of public instruction.

Oregon

OR ST § 336.635

Enrollment in alternative program; notice to district, billing, status of teachers.

(1) When necessary to meet a student's educational needs and interests, the parent or guardian with the approval of the resident district and the attending district may enroll the student in one of the proposed appropriate and accessible public alternative programs or the private alternative programs of instruction or instruction combined with counseling registered with the Department if Education. If the child is determined to be eligible for special education under ORS 343.221 to 343.236 and 343.295, the program must be approved by the Department of Education prior to the placement of the student in the program. . . .

OR ADC 581-015-0126

Applications for Approval of Private Schools as Contractors with Public Agencies for Early Intervention or Special Education Services.

Private Schools that intend to provide early intervention or special education under contract or subcontract with the state, excluding educational agencies providing educational programs at treatment centers pursuant to ORS 581-015-0044, or with a public school for children with disabilities ages birth through 21 years shall apply annually to the Oregon Department of Education, Office of special Education for approval. For the purposes of this rule,"public agency" means school districts and other public agencies that contract to provide early intervention or special education services.

Pennsylvania

22 PA ADC § 342.43

Approved private schools

(a) Eligible students and eligible young children may be placed in an approved private school if an appropriate placement cannot be provided within the local public school solely because of the nature of the educational or related needs of the student or young child.

22 PA ADC § 14.43

Approved private schools

(a) Approved private schools may be utilized as providers of services necessary to provide an appropriate program to an eligible student or an eligible young child.

South Carolina

SC ST § 59-33-50

Establishment and operation of programs by school districts; contracts between districts; special arrangements for multiple-handicapped children.

. . . When a school district cannot satisfy the requirements of this section by providing for the education of its resident handicapped children because of insufficient numbers, the district may contract with other districts within the State or school system or public or private institutions or agencies within or without the State which maintain approved special educational facilities.

New York

NY ADC 200.7

Program standards for education programs for students and preschool students with disabilities being educated in

private schools and State-operated or State-supported schools.

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(i) Private schools and special-act school districts for students with disabilities, including summer schools, shall be eligible for approval by the commissioner to receive public funds for the education of students with disabilities, provided such schools meet the criteria in this Part.

Texas

TX EDUC § 29.008

Contracts for Services; Residential Placement

(a) A school district, shared services arrangement unit, or regional education service center may contract with a public or private facility, institution, or agency inside or outside of this state for the provision of services to students with disabilities. Each contract for residential placement must be approved by the commissioner.

Tennessee

TN ST § 49-10-701

General provisions.

The state board of education is hereby authorized to do whatever it deems necessary in the area of special education to:

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(6) Permit a local school system board of education to contract with a suitable private institution or organization located in the same county for the provision of such approved facilities and services for exceptional children, and to permit the expenditure of funds by such local school system board of education to constitute approved expenditures hereunder; provided, that the authority of the commissioner, the local superintendent of schools, and all public school officers shall be as full and ample in such private institution as in any school of the local school system; and provided further, that the facilities and services of such private institution meet the minimum standards as prescribed by the state board of education; . . .

Vermont

VT ST § 2948

State aid

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(g) Notwithstanding any law to the contrary, a child with a disability who is residing in a state school, hospital or community residential facility or in a state approved private school district in which the facility is located, provided, however, that this special education may be directly provided by the facility in which the child resides when the child's individualized education and treatment plans indicate that the facility is the most appropriate educational placement for the child. Programs of special education provided by a facility described in this subsection shall be subject to the approval of the commissioner. . . .

Virginia

VA ST § 2.1-758

Eligibility for state pool of funds.

A. In order to be eligible for funding for services through the state pool of funds, a youth, or family with a child, shall meet one or more of the criteria specified in subdivisions 1 through 4 below and shall be determined

through the use of a uniform assessment instrument and process and by policies of the community policy and management team to have access to these funds.

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3. The child or youth requires placement for purposes of special education in approved private school educational programs.